L.S.F. Transportation, Inc. a/k/a L.S.F. Trucking, Inc. *and* International Brotherhood of Teamsters, Local 142, AFL–CIO. Cases 13–CA–33256, 13–CA–33289, 13–CA–33374-2, 13–CA–33385, 13–CA–33417, 13–CA–33511, 13–CA–33539, and 13–RC–19111

March 27, 2000

DECISION, ORDER, AND DIRECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 4, 1996, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a brief in support. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt his recommended Order as modified and set forth in full below.[2]

1. The judge found, and we agree, contrary to our dissenting colleague, that the Respondent constructively discharged Walter Michaels in violation of Section 8(a)(3). Michaels, upon commencing employment in September 1992, informed the Respondent's management that he only wanted to make short or local runs, i.e., runs within a 120-mile radius of the Respondent's facility. Indeed, Michaels' interest in making only short runs was common knowledge among the Respondent's dispatchers and, as requested, he was assigned to short runs almost exclusively. However, after the Respondent was awarded a contract to deliver beer within a two- to three-state area, Michaels was asked to make long-haul runs because there was a shortage of drivers. He agreed to making these runs, but only after receiving assurances from the Respondent's operations manager, Scott Belt, and Valerie Day, one of its dispatchers, that he would be reassigned to primarily short runs after additional drivers were hired. He subsequently made eight nonconsecutive long-haul runs from November 1994 through January 1995, the last of which was made on January 31. Thereafter, Michaels returned to making short runs.

On March 27, just days after the representation petition was filed, Michaels made a short run as usual. Later that evening, however, Day called Michaels at home to ask him if he would take a long-haul run to Detroit that same evening. Michaels declined, stating that he had already worked a full day and that he did not believe he would have sufficient hours left to drive to Detroit under the Department of Transportation's regulations. Almost immediately thereafter, Day called Michaels back to ask if he would reconsider taking the long-haul run, but he again declined. Belt then got on the telephone with Michaels and asked him to take the run. Michaels declined yet again, whereupon Belt unlawfully suspended him for 2 days.[3] While suspended, Michaels went on medical leave to undergo surgery.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In this regard, we find no merit to the Respondent's contention that the judge's credibility findings are undermined by his consistent crediting of the General Counsel's witnesses over those of the Respondent. The total rejection of one party's witnesses does not of itself constitute a basis for overturning a judge's credibility determinations. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

In finding that the Respondent unlawfully discharged Mark Hasse and unlawfully issued a written warning to Ronald Holland, the judge relied on testimony by Cindy Olsen, a dispatcher, that she was present at a mandatory safety meeting held on or about February 21,1995, at which she heard Operations Manager Scott Belt instruct drivers not to scale every load but to use their discretion in deciding when to scale. Olsen did not offer such testimony. We correct this factual error, which does not affect the result of the case in light of the other credited and mutually corroborative testimony of drivers Ronald Holland, William Owens, Mark Hasse, Michael Dooley, and Dennis Hill, that despite the January 9 memo mandating that all loads be scaled, after the February safety meeting, drivers had been advised they were under no obligation to scale every load.

In the absence of exceptions, we adopt, pro forma, the judge's recommendation to sustain the challenges to the ballots of voters Kevin Sadler and Steve Andrysiak and to overrule the challenge to the ballot of Ronald Holland.

Finally, in the absence of exceptions, we adopt, pro forma, the judge's recommendation that the Petitioner's Objections 4, 8, 13, and 18 be overruled.

[2] The judge found that the Respondent unlawfully discontinued the practice of allowing drivers to use their ComData cards for cash advances and instituted new work rules for employees on April 8, 1995, in violation of Sec. 8(a)(3). The judge, however, failed to include these findings in his conclusions of law. We shall correct this inadvertent error.

We shall also modify the judge's conclusions of law, recommended remedy, and Order and notice to conform to his finding that the Respondent unlawfully changed Dennis Hill's driving assignments from long hauls to shorter runs and subsequently refused to assign him work at all after placing him on medical leave and further unlawfully changed Michael Dooley's driving assignments from long hauls to shorter runs.

Finally, in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), we shall also change the date in par. 2(f) of the judge's recommended Order to March 21, 1995, the date of the first unfair labor practice.

[3] The judge found, and we agree, that Michaels' 2-day suspension was unlawful and retaliatory in nature. In so finding, the judge reasoned that Michaels had made it clear that he had no interest in doing long-haul runs, the Respondent had honored this request in the past by assigning him primarily to short runs, and Michaels had refused such additional runs in the past without repercussions. Since the Respondent did not establish that such an assignment could not have been given to some other driver, the judge found, and we agree, that the Respondent set up the situation knowing full well, or at least suspecting, that Michaels would decline, affording it an opportunity to retaliate against him by suspending him. We note that our dissenting colleague, like us, adopts the judge's finding regarding the unlawful nature of the suspension.

Upon reporting back to work on the evening of May 15, Michaels was assigned a long-haul run to Detroit, the very run which he had declined to make on March 27, and which led to his unlawful suspension. Prior to making the run, Michaels informed Day and Belt, yet again, that he did not want to be assigned long-haul runs. On May 17, Michaels was dispatched to Indianapolis and on May 18 to Des Moines, both long-haul runs. In each instance, Michaels informed Day that he did not want long-haul assignments. Subsequent to arriving in Des Moines on May 18, Michaels called the Respondent's facility and was told that he had to pick up a "backhaul" load in Cedar Rapids and bring it directly to Chicago.[4] He was then informed that after he returned to the Respondent's facility from Chicago he had to make yet another long-haul run, this time to Indianapolis. It was at this point that Michaels realized that things were "not going to get better at L.S.F." After calling his wife to discuss the situation, they agreed that he had no choice but to quit. Michaels then called the Respondent. He spoke with Day first, informing her that he was quitting, whereupon she put Belt on the telephone. Michaels then informed Belt that he was quitting because his body could not handle the amount of hours he had been asked to work since his return from medical leave and he did not want to risk having an accident. Belt's only response was that Michaels should bring the truck back to the Respondent's facility and turn in his property.

Unlike our colleague, we agree with the judge that the Respondent constructively discharged Michaels by assigning him upon his return from medical leave to long-haul runs exclusively. The test for such cases is set forth in *Crystal Princeton Refining Co.*:[5]

> There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

With respect to Michaels' situation, we find, like the judge, that the General Counsel met his burden and proved both elements for establishing a constructive discharge. Although conceding that long-haul runs are more difficult and unpleasant than short runs,[6] our dissenting colleague concludes, nonetheless, that the General Counsel did not meet his burden with respect to the first element of *Crystal Princeton*.[7] Thus, our colleague contends that a few long run assignments do not establish an intolerable working condition. In this regard, he suggests that the General Counsel failed to establish that the Respondent planned on subjecting Michaels to a "steady diet" of long-haul runs.[8] We disagree.

In support of his contention that the long-haul runs were so difficult and unpleasant so as to cause Michaels, the Respondent's most senior employee, to quit, the General Counsel established not only that Michaels had made it clear to the Respondent when he was hired that he wanted to make short runs only, but that the Respondent had honored his wishes by assigning him primarily to short runs except for a brief period in late 1994. Even then, the Respondent assigned long-haul runs to Michaels only after assuring Michaels that this change in assignments would be temporary. When Michaels returned from medical leave, however, the Respondent, with no explanation, immediately assigned him, not coincidentally we believe, to the very run which he had only recently declined to make and which ultimately resulted in his unlawful suspension. Thus, unlike before, the Respondent gave Michaels no assurances that the long-haul run assignments would not go on indefinitely. And unlike before, Michaels was assigned to consecutive long-haul runs, making his working conditions all the more intolerable. Further, we find it significant that at the same time that the Respondent reassigned Michaels to long-haul runs exclusively it also, as found by the judge, unlawfully changed the driving assignments of employees Holland, Hasse, Hill, Kawa, and Dooley, because of their union activities. Thus, almost immediately after the representation petition was filed, the Respondent undertook a course of action whereby, without explanation, it reassigned Holland, Dooley, and Kawa, who had previously made primarily long-haul runs, to short runs, while simultaneously reassigning Michaels and Hasse, who had previously made primarily short runs, to long-haul runs.

Based on the above, we find that, upon Michaels' return from medical leave, the Respondent subjected Michaels to a "steady diet" of long-haul runs, knowing full well, or at least suspecting, that Michaels would quit if it indefinitely and exclusively assigned him to long-haul runs day after day. Under these circumstances, we agree with the judge that it was reasonably foreseeable

[4] A "backhaul" load was ordinarily brought back to the Respondent's facility by one driver and then was delivered the next day to its final destination by another driver.

[5] 222 NLRB 1068, 1069 (1976).

[6] As noted by the judge, long-haul runs require driving for extended hours, spending nights away from home, and sleeping in small compartments. Indeed, the judge credited Michaels that this was precisely why he did not want to do long-haul runs and why he had requested short runs.

[7] Our colleague does not appear to dispute that the General Counsel proved the second element of *Crystal Princeton*, i.e., that the burdens were imposed because of Michaels' union activities. Indeed, we note, that like us, our colleague adopts the judge's finding that the Respondent unlawfully interrogated Michaels on two occasions and, as noted above, further adopts the judge's finding that Michaels was unlawfully suspended in retaliation for his union activities.

[8] Our colleague, nevertheless, concedes that if Michaels was, in fact, subjected to a "steady diet" of long-haul runs it would be foreseeable that he would quit.

that the continued assignment of long-haul runs would eventually cause, and ultimately did cause, Michaels to quit the Respondent's employ. Accordingly, we adopt the judge's decision finding that Michaels was constructively discharged in violation of Section 8(a)(3) and (1).

2. We further agree with the judge's conclusion that the Respondent discharged John Kawa because of his support for the Union, and not for the citations he received on May 1, in violation of Section 8(a)(3) and (1). While en route to Detroit, Kawa was stopped and cited for speeding. He was then given a breathalyzer test, which registered .009 percent, whereupon he received a second citation for having a "detectable amount of alcohol" in his system, but not for driving under the influence. Kawa's license was subsequently confiscated to serve as a cash bond for the speeding citation. Upon returning to the Respondent's facility, Kawa gave Belt copies of the citations, including the results of the breathalyzer test. Belt immediately suspended Kawa, pending the return of his license. Although the suspension notice noted that Kawa was suspended indefinitely "pending further investigation," Kawa nevertheless received repeated assurances from Belt that as soon as he regained his license he would in all likelihood be brought back to work. On May 18, after his license was returned, Kawa spoke with Comptroller Jerry Helton, who also offered him similar assurances. On May 23, Kawa met with Belt, Helton, and the Respondent's attorney who told him, contrary to those repeated assurances, that he could either quit or be fired because of the May 1 citations. According to the Respondent, its rules require immediate dismissal for consuming alcohol "prior to or during working hours."

The judge found, and we agree, contrary to our dissenting colleague, that the Respondent failed to demonstrate by a preponderance of the credible evidence that it would have discharged Kawa even in the absence of any union conduct.[9] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge found, with ample record support, that the Respondent's explanation for discharging Kawa was pretextual. For example, despite its contention that Kawa was terminated because he received the citations, it offered no explanation for why it did not follow its own purported rules and immediately terminate him for consuming alcohol "prior to or during working hours." In addition, it failed to explain why it did not immediately discharge Kawa even though it clearly had all the evidence that it needed as of May 1. Further, it did not explain, and offered no evidence to show what, if any, investigation it conducted between May 1 and 23. Finally, it offered no explanation why, if it was likely that Kawa would be discharged, he was repeatedly assured that he would in all likelihood be returning to work once he got his license back. Thus, as noted by the judge, the Respondent offered no explanation as to what occurred between May 1 and 23 to cause it to change its mind and convert Kawa's suspension into a discharge. Therefore, the judge concluded, and we agree, that the Respondent seized on the May 1 incident as a way of ridding itself of a union adherent.[10]

Finally, and most significantly, the judge specifically discredited the testimony of Belt and Helton that Kawa was discharged because of the citations he received on May 1, and there is no basis for reversing the judge's credibility determinations. See footnote 1, supra. Regardless of whether the reasons advanced by the Respondent are reasons that the Respondent *could* have relied on as a basis for discharging Kawa, the judge has made credibility based findings that these were not the reasons that the Respondent *did* rely on. We therefore reject our dissenting colleague's contention that the Respondent has carried its burden of showing that it would have discharged Kawa because of the May 1 incident even in the absence of Kawa's union activity.[11]

3. Finally, we agree with the judge that under the circumstances of this case that a *Gissel*[12] bargaining order is warranted. As explained in *General Fabrications Corp*., 328 NLRB 1114, 1116 fn. 17 (1999), we disagree with our dissenting colleague's position that the Board should reserve judgment on the *Gissel* bargaining order until after the election results in the representation case are known.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 6.

"6. The Respondent has violated Section 8(a)(3) and (1) of the Act by:

"(a) Issuing written warnings to Ron Holland and Dennis Hill in retaliation for their support for, or activities on behalf of, the Union.

"(b) Laying off Mark Hasse for 1 day and Walter Michaels for 2 days because of their support for, or activities on behalf of, the Union.

"(c) Changing the work assignments of Ronald Holland, Walter Michaels, Mark Hasse, Dennis Hill, John Kawa, and Michael Dooley because of their support for, or activities on behalf of, the Union.

[9] Our colleague assumes arguendo that the General Counsel established that animus against Kawa's union activities was a motivating factor in the Respondent's decision to discharge him.

[10] In this regard, we note that Kawa was not simply another union adherent, but as of May 23, he was the last known union adherent still left in the Respondent's employ.

[11] Although we find the judge's discrediting of Belt's and Helton's testimony concerning their reason for discharging Kawa significant support for our conclusion that the Respondent did not sustain its *Wright Line* defense, we do not, as our dissenting colleague asserts, rely on that alone. As explained above, other circumstances also suggest that the Respondent's asserted reason was a pretext for discrimination.

[12] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

"(d) Discharging, constructively or otherwise, Mark Hasse, Michael Dooley, Ronald Holland, Walter Michaels, William Owens, and John Kawa because of their support for, or activities on behalf of, the Union.

"(e) Refusing to assign work to Dennis Hill after placing him on medical leave because of his support for or activities on behalf of, the Union.

"(f) Discontinuing the practice of allowing drivers to use their ComData cards for cash advances because of their activities on behalf of, or their support for, the Union.

"(g) Instituting new work rules for employees."

2. Substitute the following for Conclusion of Law 8.

"8. By the foregoing conduct, the Respondent has engaged in objectionable conduct requiring that the election conducted on April 29, 1995, in Case 13–RC–19111 be set aside if the Petitioner has not received a majority of the ballots cast once the challenged ballots of employees Michael Dooley, Mark Hasse, and Ronald Holland are opened and counted and a revised tally of ballots is prepared and served on the parties."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, L.S.F. Transportation, Inc. a/k/a L.S.F. Trucking, Inc., Hammond, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union, International Brotherhood of Teamsters, Local 142, AFL–CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time truck drivers employed by the Employer at its facility currently located at 1334 Field Street, Hammond, Indiana; but excluding all other employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

(b) Making unilateral changes in the employees' terms and conditions of employment without providing the Union with notice and an opportunity to bargain over such changes to agreement or valid impasse.

(c) Coercively interrogating employees concerning their union activities and those of other employees.

(d) Creating the impression that it is engaging in the surveillance of its employees' union activities.

(e) Threatening employees with plant closure, job loss, discharge, and other unspecified reprisals for engaging in union activities.

(f) Issuing warning notices, suspending, laying off, changing the driving assignments, discharging, constructively or otherwise, refusing to give work assignments to employees by placing them on medical leave, and discontinuing the practice of allowing drivers to use their ComData cards for cash advances, because of their activities on behalf of, or support they lent to, the Union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of all employees in the above-described appropriate unit and, if an understanding is reached, embody such understanding in a signed written agreement.

(b) Rescind the work rules enacted on April 8, 1995, and reinstate its policy of allowing drivers to use the Company's ComData cards for cash advances.

(c) Within 14 days from the date of the Order, offer immediate and full reinstatement to Mark Hasse, Michael Dooley, Ronald Holland, Dennis Hill, Walter Michaels, William Owens, and John Kawa to their former jobs or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges.

(d) Make the above employees whole for any pecuniary or other losses they may have sustained by reason of the discrimination against them, including losses sustained due to suspensions and/or layoffs, changes in their work assignments, and/or being placed on medical leave in the manner set forth in the remedy section of this decision.

(e) Within 14 days of this Order, remove from its files any and all reference to the unlawful suspensions and/or layoffs, discharges, and being placed on medical leave, and also remove from the files of Ronald Holland and Dennis Hill the warnings issued to them, and within 3 days thereafter notify all of the above employees in writing that this has been done and that the suspensions and/or layoffs, discharges, warnings, and being placed on medical leave will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Hammond, Indiana, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since March 21, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the challenges to the ballots of the following employees are overruled: Michael Dooley, Mark Hasse, and Ronald Holland; and that the challenges to the ballots of Steve Andrysiak and Kevin Sadler are sustained.

IT IS FURTHER ORDERED that Case 13–RC–19111 is severed from Cases 13–CA–33256, 13–CA–33289, 13–CA–33374–2, 13–CA–33385, 13–CA–33417, 13–CA–33511, and 13–CA–33539, and that it is remanded to the Regional Director for Region 13 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 13 shall, within 14 days from the date of this decision, open and count the ballots of the employees listed above, and that she shall prepare and serve on the parties a revised tally of ballots.

If the revised tally of ballots in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 13–RC–19111.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues and the judge, I cannot find that the Respondent unlawfully discharged employees Walter Michaels and John Kawa. Further, I would not pass at this time on the propriety of imposing a *Gissel* bargaining order.

The judge found, and my colleagues agree, that the Respondent constructively discharged Walter Michaels. As fully described by the judge, driver Michaels performed mostly short runs for the Respondent, and he had stated to the Respondent that he was only interested in performing short runs. In May 1995, after receiving a few longrun assignments, Michaels quit. The judge found that the Respondent assigned Michaels long runs because of his union activity. The judge found that the Respondent knew, or should have reasonably foreseen, that its assignments would cause Michaels to quit. The judge therefore concluded that the Respondent constructively discharged Michaels in violation of Section 8(a)(3) and (1) of the Act.

As the judge correctly stated, the General Counsel must establish that the new working condition was so difficult or unpleasant as to force the employee to resign.

The General Counsel has not established a violation under that standard. It is true that long runs are more difficult and unpleasant than short runs. However, a few such assignments do not establish an intolerable working condition. Indeed, Michaels had driven long runs in the past and had nonetheless continued working. Concededly, if Michaels had been subjected to a steady diet of long runs, it may well have been foreseeable that he would quit. But there is no evidence that Michaels was subjected to such a steady diet. He was assigned long runs on March 27 and for a few days in May. At that point, he came *to his own conclusion* that "things were not going to get any better." He therefore quit. He did not ask the Respondent whether a steady assignment of long runs would continue. If he had done so, and if the answer had been affirmative, the General Counsel may well have met his burden. However, absent that, and absent any indication that the Respondent intended to subject him to a steady diet of long runs, I believe that the General Counsel has not met his burden of proof.[1]

The judge also found, and my colleagues agree, that the Respondent's discharge of driver Kawa violated Section 8(a)(3) and (1) of the Act. I disagree. I assume arguendo that the General Counsel presented a prima facie case in regard to Kawa's discharge. However, I find that the Respondent met its rebuttal burden of showing that it would have discharged Kawa even absent his union activity. As fully set forth by the judge, the Michigan State Police cited Kawa for speeding on May 1, 1995. The police also confiscated Kawa's driver's license and gave him an additional citation for failing a breathalyzer test. When the Respondent learned of this incident, it suspended Kawa indefinitely, pending further investigation. That suspension is not challenged. When Kawa spoke with the Respondent's operations manager, Scott Belt, Belt said that when Kawa got his license back he would "probably go back to work." After getting his license

[1] The essential difference between me and my colleagues is that they conclude that "the Respondent subjected Michaels to a 'steady diet' of long-haul runs." In my view, the long runs of March 27 and a few days in May do not establish a "steady diet" of long runs. The fact is that Michaels decided on his own—and prematurely—that the long runs would not change. Michaels did not ask Operations Manager Scott Belt how long his assignments of long runs would continue. Belt did not tell Michaels that longrun assignments would continue indefinitely. Rather, Michaels, without in any manner confirming that he would continue to receive longrun assignments, took it on himself to quit. I cannot agree that—at the time Michaels quit—his assignments had been so difficult or unpleasant as to cause his resignation.

back on May 18, Kawa spoke with the Respondent's comptroller, Jerry Helton, who also stated that Kawa would "probably" be put back to work. However, on May 23, the Respondent ultimately refused to reinstate Kawa and instead discharged him.

In rejecting the Respondent's rebuttal case, the judge faulted the Respondent for not explaining why, between May 1 and 23, it decided to discharge Kawa rather than reinstate him. The judge concluded that the Respondent must have seized on an opportunity to rid itself of a union activist. In my view, the flaw in the judge's reasoning is that there is no showing that Kawa engaged in further union activity between May 1 and 23. Thus, the Respondent knew of his union activity on May 1, and yet it held out the possibility of leniency. I see no basis to infer that Kawa's union activity had an impact on the Respondent's ultimate decision to discharge. In these circumstances, and noting especially the seriousness of Kawa's misconduct, I conclude that the Respondent would have discharged Kawa even absent his union activity.

My colleagues raised questions concerning the Respondent's decision *not* to discharge Kawa on May 1. My colleagues' position on this point is a curious one. The Respondent knew, as of May 1, of Kawa's activities on behalf of the Union. Clearly, if the Respondent wanted to rid itself of Kawa, that would have been the perfect opportunity to do so. As discussed, it did not do so. To the contrary, it offered the likelihood of his retention.

Further, I do not agree with the majority that the issue of whether there is discriminatory motive is one of credibility. My colleagues submit that the judge discredited the Respondent's witnesses, Belt (the operations manager) and Helton (the comptroller), and "therefore" the Respondent's rebuttal case must be rejected. While the judge did not credit witnesses Belt and Helton, the judge acknowledged that "the inquiry does not end here." Rather, the ultimate issue—the "question remaining" as the judge put it—is whether Kawa would have been terminated even absent his union activity. Again, given that the Respondent knew full well of Kawa's union activity on May 1, I find no basis to conclude—as did the judge—that the Respondent's May 23 decision was based on Kawa's union activity. Thus, I cannot agree with the judge and my colleagues' finding of a violation. I conclude that Kawa would have been discharged, even in the absence of union activity, for his serious misconduct.[2]

Finally, unlike the judge and my colleagues, I would not impose a *Gissel* bargaining order at this time. As set forth in my dissent in *General Fabrications Corp.*, 328 NLRB 1114 (1999), I would not impose a *Gissel* order when a representation election has yet to be resolved. Here, the current tally is 5 for the Union, 7 against, with 3 challenged votes to be counted. It is quite possible that the union has won the election and no second election will be held. As I said in *General Fabrications*, if the union is certified as the collective-bargaining representative, a *Gissel* order is not appropriate. If the union has lost, I would at that point resolve the need for this remedy.

[2] If my colleagues were correct, a judge could find a violation based solely on the discrediting of a respondent's testimony that "I did not discharge the employee for his union activity." In my view, more analysis is required.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Local 142, AFL–CIO as the exclusive representative of the employees in the following appropriate unit:

> All full-time and regular part-time truck drivers employed by the Employer at its facility currently located at 1334 Field Street, Hammond, Indiana; but excluding all other employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT alter the terms and conditions of employment for unit employees by imposing new work rules and changing our policy regarding their use of ComData cards without first bargaining with the Union to agreement or impasse.

WE WILL NOT interrogate our employees regarding their activities in support of Teamsters Local 142, create the impression that their activities are being kept under surveillance, or threaten them with plant closure, loss of jobs, discharge, or other unspecified reprisals because they support the Union.

WE WILL NOT discharge, constructively or otherwise, suspend, lay off, refuse to assign work by placing on medical leave, change the work assignments of, or issue written warnings to, employees or discontinue the practice of allowing drivers to use their ComData cards for cash advances, because they engaged in activities on

behalf of, or lent their support to, Teamsters Local 142, or to discourage other employees from supporting Teamsters Local 142 or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Teamsters Local 142, and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining unit.

WE WILL rescind the work rules implemented April 8, 1995, and reinstate our policy regarding driver use of ComData cards for cash advances.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Hasse, Michael Dooley, Ronald Holland, Dennis Hill, Walter Michaels, William Owens, and John Kawa full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Hasse, Michael Dooley, Ronald Holland, Dennis Hill, Walter Michaels, William Owens, and John Kawa whole for any loss of earnings and other benefits sustained by them resulting from their unlawful discharges and forced medical leave, and shall further make whole Mark Hasse and Walter Michaels for any loss of earnings resulting from their unlawful suspension and/or layoff, and for any losses Mark Hasse, Michael Dooley, Walter Michaels, Ronald Holland, Dennis Hill, and John Kawa may have sustained resulting from the change in their work assignments, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to unlawful discharge, placement on medical leave, suspension, or layoff of the above employees, and shall further remove from the files of Dennis Hill and Ronald Holland the unlawful warnings issued to them, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that such actions will not be used against them in any way.

L.S.F. TRANSPORTATION, INC. A/K/A L.S.F. TRUCKING, INC.

Sheryl Sternberg and *Mary F. Herrmann, Esqs*., for the General Counsel.[1]

Walter J. Liszka and *Renée L. LeGrand, Esqs. (Wessels & Pautsch, PC),* for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to various charges filed by the Union, International Brotherhood of Teamsters, Local 42, AFL–CIO, between March 23 and August 8, 1995,[2] the Regional Director for Region 13 of the National Labor Relations Board (the Board), on August 18, 1995, issued an order consolidating cases, consolidated complaint and notice of hearing, alleging that Respondent L.S.F. Transportation, Inc. a/k/a L.S.F. Trucking, Inc. had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). On August 25, 1995, the Regional Director issued a Report on Challenged Ballots and Objections to an election held in Case 13–RC–19111, finding that the issues raised by the challenged ballots and objections parallel the unfair labor practice allegations contained in the August 18, 1995 consolidated complaint, and ordered that Case 13–RC–19111 be consolidated for hearing with the unfair labor practice allegations. A hearing in the matter was held before me in Chicago, Illinois, between October 16–19, and November 13–14, 1995, during which all parties were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporate entity, with an office and place of business in Hammond, Indiana, has, at all material times, been engaged in the interstate and intrastate transportation of freight and has, during the same period and in the conduct of its business operations, purchased and received at its above facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I further find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues in this case are:

1. Whether the Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees about their sympathies for or activities on behalf of the Union, promising them higher wages and additional work if they did not select the Union as their collective-bargaining representative, and threatening them with discharge, layoff, plant closure, freezing of benefits, and other unspecified reprisals if they did so.

2. Whether it violated Section 8(a)(3) and (1) of the Act by:[4]

[1] Referred to as the General Counsel.

[2] All dates are in 1995, unless otherwise indicated.

[3] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

[4] At the hearing, the Respondent moved to dismiss any and all complaint allegations pertaining to employees Wayne Sigler and Kevin Sadler, as well as any objections to the election relating to these two

(a) Withholding work from and/or changing the work assignments of employees Ronald Holland, John Kawa, Dennis Hill, Michael Dooley, and Mark Hasse because of their support for or activities on behalf of the Union.

(b) Temporarily laying off Hasse for 1 day, and subsequently discharging him on March 31 because of his union activities.

(c) Issuing employee Walter Michaels a 2-day suspension on or about March 27, constructively discharging him on or about May 18, because of his support for the Union.

(d) Issuing written reprimands to employees Holland and Hills, and thereafter discharging Holland on April 7, and unlawfully placing Hill on medical leave on April 13, because they supported the Union.

(e) Retaliating against employees for their union activities by instituting new work rules and prohibiting them from using the company credit (ComData) card for cash advances.

3. Whether the unilateral institution of new work rules and policy change regarding employee use of the ComData card violated Section 8(a)(5) and (1) of the Act, and whether a bargaining order is an appropriate remedy in this case.

B. Factual Background

The Respondent, a trucking operation in Hammond, Indiana, is owned and operated by the Faure family, with Amy Faure, an admitted supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act, serving as its president. Its day-to-day operations are managed by Operations Manager Scott Belt, an admitted supervisor. Other managerial personnel involved in this proceeding are Craig Crohan, vice president of operations; Bill Burnson, manager; Jerry Helton, the comptroller; and Valerie Day, a dispatcher, all of whom are admitted supervisors and agents of Respondent under Section 2(11) and (13) of the Act. The Respondent had two other dispatchers—Cindy Olson and Diane (Dee) Qualls—who made the daily routes and delivery assignments to the drivers.[5]

The Faure family also owns and operates other warehouse facilities, including the Great Lakes Warehouse located in Hammond just 3 miles from the L.S.F. Warehouse facility, the Gateway Warehouse located in Calumet City, Illinois, and the Iliana Transit Warehouse. The Respondent began operations in 1992, utilizing five leased trucks and five drivers. In August 1994, the Respondent was awarded a contract to deliver Coors beer within a two- to three-state area. To handle the increased business, the Respondent expanded its operations by leasing additional trucks and hiring additional drivers. Thus, in August 1994, Respondent's fleet of trucks increased from 5 to 21 units, and its complement of drivers went from 5 to approximately 25.[6] In addition to the Coors account, the Respondent serviced two other long-distance clients—Rhone Poulenc in St. Louis, Missouri, and Frank's Nursery in Detroit, Michigan. The Respondent also handled what was commonly referred to as local runs of no more than 120 miles. These local runs included deliveries to locations in Indianapolis, Indiana, Milwaukee, Wisconsin, Chicago, Illinois, and surrounding areas. For local runs, drivers were paid an on-the-clock rate of $12.50 per hour. Drivers performing the long-distance hauls to Coors, Rhone Poulenc, and other areas were paid on a mileage basis computed at 26 cents per mile.

Respondent's drivers possessed either a class A or class B commercial driver's license (CDL). The class A-CDL drivers are licensed to drive straight as well as tractor-trailer type trucks, while class B-CDL drivers are restricted to driving the smaller (straight) trucks and are limited as to the amount of weight they may carry in their trucks. To obtain either a class A or B CDL, drivers must undergo a physical examination, and every 2 years must also pass a Department of Transportation (DOT) physical examination. On passing a DOT exam, drivers are given a medical card, which they must carry as proof that they have complied with DOT regulations. DOT regulations further limit the amount of hours a driver can be "on duty" to no more than 15 hours in a 24-hour period. Thus, while a driver is permitted to drive for no more than 10 hours, he or she may be "on duty" for an additional 5 hours, which would allow for any downtime required for loading or unloading of trucks. To ensure compliance with these rules, drivers maintain a daily log reflecting the number of hours driven and their destination. DOT regulations further limit to 80,000 pounds the total amount of weight (including tractor, cargo, and fuel weight) that can be carried by trucks on interstate highways. To ensure compliance, weigh stations are located along interstate highways and truckers are required to stop and weigh or "scale" their trucks. The record reflects that by memo dated January 9, the Respondent instituted a policy mandating that all loads be scaled. However, according to the testimony of several employee witnesses, approximately 1 month later in February, during a mandatory safety meeting, Belt told the drivers that scaling every load was becoming too expensive and that they should henceforth use their own discretion in deciding whether or not to scale a load. I credit the mutually corroborative testimony of the employee witnesses and find that despite its January 9 memo, after the February meeting, drivers were under no obligation to scale every load.[7]

individuals (Tr. 659–662). I deferred ruling on the motion pending receipt of the parties' briefs. Having duly considered the matter, and as no evidence was adduced regarding these two individuals, the Respondent's motion to dismiss with respect to Sigler and Sadler is granted.

[5] No contention has been made that either Olson or Qualls is a statutory supervisor.

[6] The Respondent utilizes two types of trucks—tractor-trailers and straight trucks—to carry freight. The tractor-trailer, a two-piece unit, was the larger of the two and often contained a sleeping compartment. The straight truck was a smaller single unit, essentially a 20-foot box, used to haul less than 15,000 pounds of freight, referred to as a "less than a trailer" load (LTLs).

[7] Belt testified that each employee was notified of the policy through placement of a copy of the memo in their company mailbox. However, his testimony in this regard is at odds with the testimony of several employee witnesses, e.g., Hasse and Holland, who stated they first saw the document on March 31, Dooley who claims Belt ordered all loads scaled after Hasse's "failure to scale" incident (discussed below), and Hill who testified he had no knowledge of such a policy. I credit the mutually corroborative testimony of the employee witnesses over that provided by Belt and find that assuming that Respondent established a scaling policy on January 9, employees were not made aware of its existence until March 31, or sometime thereafter. Holland, Owens, Hasse, Dooley, and Hill also provided mutually corroborative and credible testimony on how Belt instructed drivers during the February meeting not to scale every load but to use discretion in deciding when to scale. Cindy Olson, a dispatcher, also testified to having been present at the meeting and to hearing Belt make the above comment. The Respondent argues that Olson could not have been present at the meeting because she had left Respondent's employ by then, citing Belt's testimony as support for its position. Belt's testimony as to when Olson left her employ was not credible. Thus, when asked if Olson was still employed on February 21 (presumably the date of the meeting), Belt stated, "I am not sure," and when asked if he recalled when Olson left Respondent's employ, Belt answered, "I believe around March is

The Union commenced its organizational campaign among Respondent's drivers on March 20, when, following a discussion between employee Dennis Hill and Union Business Agent John Jurcik, a union meeting was held that evening at the union hall attended by Hill and employees Holland, Sadler, and Michaels. At this meeting, an "Open Letter to Management," addressed to Respondent, was prepared which read, "As members of the union Committee, we know our rights to organize. We expect the Company to respect these rights." (See G.C. Exh. 4.) The Union also provided employees at the meeting with two copies of a "Petition for the Union," each of which was to be circulated to other employees by Holland and Hill, which contained the following language: "We the undersigned hereby declare that in order to achieve fairness on the job, we authorize the Teamsters Union Local No. 142 to represent us for the purposes of Collective Bargaining" (G.C. Exhs. 5[a]–[b]). All four employees present at this meeting signed both petitions. Employees Hasse and Dooley signed later that evening. Hasse also signed the "Open Letter to Management" letter that had earlier been signed by Holland and Hill.[8] The following day, March 21, employees Bill Owens, John Kawa, Daniel Babcock, Jose Saenz, Jeffrey Perz, and Dwayne Sigler signed the petitions, bringing to 12 the total of number of employees expressing a desire to be represented by the Union. That same day, Holland and Hill went to Belt's office at approximately 2:30 p.m. and personally handed him the "Open Letter to Management." As to the Union's petitions, Hill stated that after he obtained the last signatures on his petition on March 21, he called Union Agent Jurcik who came to his house that evening to pick up the petitions. Although Holland testified he believed the petitions were turned over to the Union on March 22, I find that he was mistaken in this regard, and that they were in fact turned over during the evening of March 21, as suggested by Hill, given that the petition was filed in the afternoon of March 22.

On receipt of the employee petitions, the Union, as noted, filed a petition for an election with the Board on March 22, in Case 13–RC–19111, seeking to represent certain of Respondent's employees.[9] On April 5, the parties agreed to an election, which was held on April 29. Of the 17 ballots casts (out of approximately 19 eligible voters), 5 were cast for, and 7 against, the Union, with 5 challenged ballots remaining which are sufficient in number to affect the results of the election. (G.C. Exhs. 1[a] and [ee].) The challenged ballots include that of employee Steve Andrysiak, who the Union alleges is an office clerical employee, rather than a driver, and should be excluded from the unit, and that of employees Dooley, Hasse, and Holland, who were challenged by the Board agent because their names did not appear on the voter eligibility list provided by the Respondent. The Respondent asserts that these individuals are not eligible to vote because they were lawfully discharged prior to the election.[10] The representational issues raised in Case 13–RC–19111 will be discussed later on in this decision.

The General Counsel contends that on learning of the Union's attempt to organize its drivers the Respondent, through its owner, officers, and managerial personnel, embarked on a course of unlawful conduct that included, inter alia, threats, interrogations, impression of surveillance, promise of benefits, warnings, suspensions, work reassignments, and eventually the discharge of drivers who supported the Union, all of which was aimed at undermining and discouraging employee support for the Union. A discussion of these allegations follows.

C. Discussion and Findings

1. The 8(a)(1) allegations

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory right to engage in, or refrain from engaging in, concerted activity. The complaint alleges that beginning on or about March 21, and continuing through the eve of the Board-conducted election on April 29, the Respondent, through admitted Supervisors Day, Belt, Amy Faure, Crohan, and Burnson, unlawfully interrogated employees regarding their union activities, created the impression that their activities were being kept under surveillance, and threatened them with plant closure, loss of jobs, discharge, and other unspecified reprisals, all in violation of Section 8(a)(1). It also alleges that on April 25, the Respondent further violated Section 8(a)(1) when Faure issued a letter to employees entitled "What will Local 142 Bring to the Table" which threatened that wages and benefits would be frozen if the Union were selected as their collective-bargaining representative. Although the Respondent in its answer denies the remarks attributed to Faure, Crohan, and Burnson, none of these individuals was called to testify. Accordingly, the remarks attributed to them by employee witnesses, discussed infra, are found to have occurred. Day and Belt, who did testify at the hearing, were not

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the date." It was only after being shown a disciplinary notice issued to Olson on January 16 (R. Exh. 27), and in response to a leading question by Respondent's counsel, that Belt stated he "believed" Olson left her employ before the February meeting. His uncertainty and vacillation regarding his knowledge of whether Olson attended the meeting is not worthy of belief. The disciplinary notice that purportedly triggered Belt's "recollection" makes no reference whatsoever to the date she was last employed and states only that she was on suspension for an incident that occurred from "12–29–94 thru 1–6–95." Any doubt as to when Olson was separated from employment could easily have been cleared up by Respondent by providing documentary evidence from its own files. It failed to do so, opting instead to rely on Belt's rather dubious testimony, which I reject.

[8] Holland and Hill each took a copy of the petition to circulate to other employees. Hasse arrived late to the meeting and, after being brought up to date by Hill on what transpired there, signed the petition (G.C. Exh. 5[a]), as well as the open letter to management. Hill also contacted Dooley at home later that evening at which time the latter signed Hill's petition.

[9] The petitioned-for unit includes:

> All full-time and regular part-time truck drivers employed by the Employer at its facility currently located at 1334 Field Street, Hammond, Indiana; but excluding all other employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

[10] The Respondent also challenged the ballot of employee Sadler on grounds he had voluntarily quit his employ prior to the election and was therefore ineligible to vote. The General Counsel had alleged in a separate charge that Sadler was constructively discharged in violation of Sec. 8(a)(3) and (1) of the Act. However, the parties stipulated at the hearing that the charge regarding Sadler had been withdrawn by the Union, which withdrawal was approved by the Regional Director (Tr. 292–293). As there is no allegation that Sadler was unlawfully discharged, his own testimony that he voluntarily quit his employ, and the fact that the General Counsel did not contend otherwise at the hearing or in her posthearing brief, I find that Sadler was not eligible to vote in the April 29 election. Accordingly, the challenge to his ballot is sustained.

asked about, and consequently did not dispute, the various statements attributed to them by employee witnesses. Thus, the employees' testimony as to what they were told by Day and Belt is credited.[11] A description of that conduct, and my findings with respect thereto, follow.

a. Unlawful conduct by Supervisor Day

(1) Towards employee Michaels

On March 21, Michaels was in Respondent's office, along with dispatcher Qualls and employee Andrysiak, when Day asked him how the union meeting had gone. Michaels, "shocked" by Day's inquiry, simply responded, "Okay." Following Day's query, a general discussion regarding unions ensued among Qualls, Andrysiak, and Day about the bad experiences they'd had with unions in the past. Midway through that discussion, Belt entered and expressed his own view that unions were no good because "they just take your money and do nothing for you."

The complaint alleges that Day's query of Michaels amounted to an unlawful interrogation and created the impression that his activities and that of other employees were being kept under surveillance. Although the questioning of an employee is not illegal per se, the Board has held that an interrogation will violate Section 8(a)(1) when, under all the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with the rights guaranteed employees under Section 7 of the Act. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In applying this test, the Board considers such factors as the background in which the questioning occurs, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Kellwood Co.,* 299 NLRB 1026 (1990). This analysis applies to all interrogations, and not simply to those directed at open and active union supporters. The fact that the recipient of the interrogation openly and actively supports the union is simply one factor to be considered in evaluating the total context of the interrogation. *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985).

Applying the *Rossmore House/Sunnyvale* test to Day's questioning of Michaels, I conclude that her inquiry was coercive and violative of Section 8(a)(1). Day's inquiry as to how the union meeting had gone took place in Respondent's office and was not the product of any casual or friendly conversation between the two but rather came straight out of the blue. That it was totally unexpected and indeed troubling to Michaels is evident from his testimony that he was "shocked" by her remark. Nothing in Michaels' testimony suggests that he was involved in any discussion with Day prior to her question or, for that matter, that he took part in the subsequent discussion between Day, Qualls, and Andrysiak, and subsequently Belt, in their antiunion conversation. Although Michaels had signed one of the union petitions, he was not an open and active union supporter. Nor was Day's interrogation an isolated incident, for as more fully described below, Day, along with other management officials, subsequently engaged in a pattern of unlawful conduct, that included among other things further interrogations and threats of plant closure, which I find was purposefully designed to frustrate and undermine employee efforts at obtaining union representation. Thus, while at first blush Day's inquiry may seem somewhat innocuous, when viewed in light of her subsequent conduct and that of other management officials, there can be no doubt that her interrogation of Michaels was simply the start of what was to be a deliberate and calculated attempt by Respondent to thwart the employees' organizational efforts. By asking Michaels how the meeting had gone, Day hoped to elicit from him information that would be of use to Respondent in gauging the level of union support among its drivers, and in developing a response thereto, and moreover created the clear impression in Michaels' mind, as evident from his "shocked" reaction to her remark, that the Respondent was fully aware of, and was keeping close tabs on, the driver's organizational attempts. I therefore find that Day's comment was indeed coercive and violative of Section 8(a)(1) of the Act. *Flexsteel Industries,* 311 NLRB 257 (1993*); R & L Transfer,* 295 NLRB 1170, 1174 (1989).

(2) Towards employee Hill

At approximately 7 a.m. on March 21, while Hill and Day were alone in Respondent's office, Day asked Hill if he knew anything about L.S.F. employees "trying to go union." Hill denied having any such knowledge, at which time Day stated that "if Amy [Faure] would find out we were trying to go union, she would close the doors." I find that Day's comments amounted to an unlawful interrogation and threat of plant closure. Like the Michaels interrogation, Day's questioning of Hill took place in Respondent's office, was initiated by Supervisor Day, and was not the product of any casual or friendly conversation between the two. Although Hill, unlike Michaels, openly declared his support for the Union later that same day by identifying himself as a member of the Union's committee in the "Open Letter to Management," and by wearing a button with the words "Teamsters Local 142" on it, when she questioned and threatened Hill at 7 a.m., Day in all likelihood would not have known of Hill's involvement with, or sympathies for, the Union.[12] Accordingly, Day's query to Hill—if he knew whether Respondent's employees were trying to go union, followed by Day's remark that Faure would close the plant if she found the drivers were trying to unionize, would reasonably have been interpreted by Hill to mean that if the Union came in the plant might be closed and jobs could be lost. For this reason, Day's comments were coercive and violated Section 8(a)(1) of the Act. *American Wire Products,* 313 NLRB 989, 993 (1994).

[11] I draw an adverse inference from Respondent's failure to call Faure, Crohan, and Burnson to testify regarding the allegations that they engaged in unlawful conduct, and from its failure to question, or to elicit denials from, Day or Belt regarding the alleged unlawful statements attributed to them by various employee witnesses. *Asarco, Inc.,* 316 NLRB 636, 640 (1995); *Flexsteel Industries,* 316 NLRB 745, 757 (1995). Regarding Day, it appears that Respondent called her as a witness for the sole purpose of contesting her supervisory status. However, when advised that Day's supervisory status had been admitted to in Respondent's answer, counsel for Respondent abruptly ended his examination of Day, and made no effort to refute the allegations pertaining to her conduct.

[12] The "Open Letter to Management" in which Hill identified himself as a member of the Union's committee was not delivered to Respondent until 2:30 p.m. on March 21, hours after Day interrogated Hill. Further, Hill began wearing his prounion button on March 22, the day after Day's encounter with Hill.

(3) Towards employee Hasse

On March 21, while in Day's office, Day asked Hasse if he "had any knowledge of the people wanting to unionize." Hasse told Day that to protect himself he would not answer her question. Two days later, on March 23, after the "Open Letter to Management" identifying Hasse as a member of the Union's committee was turned over to Belt, Day again questioned him about the Union. Thus, while in her office, Day asked Hasse why the employees wanted to unionize, and why he was behind it. Hasse replied that it was their right to do so.[13] Approximately 1 week after the petitions were signed and the "Open Letter" was delivered to Belt, Hasse heard Day remark to another employee, identified only as Sharon, that she did not know why employees wanted to unionize, and that should this occur, "the company would close."

There is no evidence to suggest that when she questioned Hasse on March 21, Day had knowledge of his involvement with the Union. In fact, her question suggests that while she may have suspected that there was union activity afoot, she was unaware of the extent of the activity or which employees were involved. Nor does the record show that Day's question to Hasse, which took place in Day's office, was part of any casual or friendly conversation between the two. Further, Day's inquiry was not limited to a simple discussion of Hasse's own views, but rather was clearly aimed at soliciting from Hasse any information he may have had regarding the organizational efforts of other employees. In these circumstances, Day's question to Hasse was coercive, *Avery Leasing*, 315 NLRB 576, 580 (1994); *BRC Injected Rubber Products*, 311 NLRB 66, 72 (1993), and Hasse's refusal to respond to protect himself is clear evidence that he viewed it as such. Ironically, his reluctance to respond in all likelihood gave Day reason to believe that he indeed supported the Union, a fact that was subsequently confirmed when the "Open Letter to Management" identifying Hasse as a member of the Union's organizing committee, was delivered to Respondent. Thus, on March 23, when Day again questioned Hasse, she was fully aware of his prounion stance, and so indicated by asking him why he was behind the effort to unionize the drivers. However, the fact that by this time Hasse had openly declared himself to be prounion does not render Day's March 23 interrogation any less coercive than her March 21 interrogation, for her March 23 conduct cannot be viewed in isolation but must be viewed in light of the other extensive unfair labor practices committed by Day and other management officials (discussed infra) during this period. *Jennmar Corp.,* 301 NLRB 623 (1991). Further, a supervisor's question aimed at determining why employees are seeking to organize constitutes coercive interrogation because this is precisely the type of information which employees under the Act are privileged and permitted to keep to themselves. *Custom Window Extrusions*, 314 NLRB 850, 858 (1994). For these reasons, I find that Day's March 23 questioning of Hasse violated Section 8(a)(1) of the Act.

Day's comment to Sharon that the Company would close if the employees unionized is also found to be violative of Section 8(a)(1). It is unclear from the record who Sharon was or what her position was with the Company. It is clear, however, that Hasse was within hearing range of the conversation and his presence in the area must have been known to Day. Thus, I am convinced that the remark, while made to Sharon, was also intended for Hasse's consumption. There is no indication from Hasse's account that Day was merely stating the predictable consequence based on objective factors of what might occur should the union drive prove successful. Rather, the remark directly linked the closure of the facility to the success or failure of the employees' organizational efforts. Under these circumstances, Day's threat of plant closure amounted to a violation of Section 8(a)(1) of the Act. *Roadway Package System,* 302 NLRB 961, 973 (1991).

(4) Towards employee Kawa

Sometime during the week of March 21, Day, in the presence of Andrysiak and another unidentified dispatcher, asked Kawa what he thought about the Union. Kawa answered he thought it would be a pretty good thing because he had some prior time with the Teamsters that would count towards his retirement, that the Teamsters had pretty good insurance, and that he "would probably go along with the majority of the guys on the vote, if it was ever to come in." Although Kawa signed the petition, he was not an open and active union supporter. Indeed, Kawa testified the conversation occurred before he even signed the petition. This inquiry, initiated by his supervisor and conducted at the L.S.F office without any indication that it was part of a friendly or casual conversation, and occurring as it did in the context of other unlawful interrogations conducted by Day, was simply part of Day's overall agenda to determine the extent of sympathy or support enjoyed by the Union among Respondent's employees, and is found to have been coercive and violative of Section 8(a)(1).

(5) Towards employee Holland

Two or three days after giving Belt the "Open Letter to Management," e.g., on or about March 24, Holland called the office for a dispatch between 3 and 4 p.m. and spoke with Day. During that conversation, Day expressed concern about L.S.F. drivers getting involved with the Union, and related to Holland that Amy Faure had told her "she would close the doors to L.S.F. before she would let the Union come in." Faure, as noted, was not called to refute this testimony, and Day, while called, was not questioned about Holland's assertion and consequently did not deny it. Given these facts, I find that Day unlawfully threatened Holland with plant closure in violation 8(a)(1) of the Act. *Dlubak Corp.,* 307 NLRB 1138, 1144 (1992). *Roadway Package System,* supra.

b. Unlawful conduct by Operations Manager Scott Belt

(1) Towards employee Owens

Sometime between 11:30 and 12 p.m. on March 21, Owens was in the L.S.F. office when Belt called him into his office and asked him if was "aware of a petition going around to start the union for L.S.F." When Owens replied he knew nothing about it, Belt proceeded to tell him that he (Belt) had spoken to two other drivers about it, that Amy Faure was opposed to the Union, and that she was "already looking at another warehouse and closing down that warehouse, sending all 15 or 20 trucks back to Biddle, breaking the lease." Belt further commented that "anybody who wants to go in the union is just greedy; if they make $1,000, they want to make $1,500." Finally, Belt

[13] Hasse's testimony as to when the second conversation with Day occurred is somewhat confusing. Initially, he testified that it occurred 1 week after the first incident, but later corrected himself by stating it occurred on March 23. This minor inconsistency does not affect his overall credibility.

remarked that he "would not go to Amy [Faure] with this, that he would consider it a personal vendetta after all the work he has done for the drivers." Owens interpreted Belt's comment as suggesting that Belt had a suspicion that drivers were involved in union activity, and that Belt would be preparing a "hit list" of drivers who supported the Union.[14] While he testified at the hearing, Belt was not asked about and consequently did not deny Owen's above assertions.

I find merit to the complaint allegation that Belt unlawfully interrogated Owens by asking him if a union petition was being circulated among employees. The questioning was initiated by Belt, a high-level member of Respondent's managerial hierarchy, occurred in Belt's own office, and there is no indication that Owens, who despite his support for the Union was not an open and active adherent, was summoned there for any other purpose than to obtain information regarding the Union. Further, Belt's question was followed immediately by what is further alleged to be, and I find was, a threat of plant closure. Thus, Belt's remarks about Faure's plan to close down a warehouse, to return a large portion of its truck fleet to Biddle, and to break its lease with Biddle, made as they were in connection with his comment that Faure was strongly opposed to the Union and viewed union supporters as greedy, conveyed the clear message that unionization, rather than economic factors beyond the Respondent's control, would result in the closing of Respondent's facility and a possible loss of jobs. Accordingly, I find that Respondent, through Belt, unlawfully interrogated Owens and threatened him with plant closure and job loss, in violation of Section 8(a)(1).

(2) Towards employee William Keener

Keener, subpoenaed by the General Counsel to testify in this proceeding, was still employed by Respondent at the time of the hearing. Prior to the hearing, more particularly on April 15, Keener provided the Board with a sworn affidavit in which he recounted certain union-related comments Belt made to him in March and early April. However, during the hearing, Keener became evasive and nonresponsive to questions posed to him by the General Counsel regarding these and other incidents, and claimed to have a poor recollection of these events. When the General Counsel sought to refresh his recollection by referring him to his affidavit, Keener sought to downplay the significance of the statements contained therein, suggesting that the affidavit was incomplete and that, in any event, he did not consider the remarks made to him by Belt and others as threats (G.C. Exh. 26). It is fairly obvious from his testimony that Keener was reluctant to testify against his Employer. Thus, in response to the General Counsel's questions, Keener became visibly upset and stated, "No. This is not right. I don't want to be here. Okay? I have been summoned to be here. I am saying what I have to say. I am not sitting here, I am not going to put anybody up. I don't know. I can't remember." He further added, "The only reason I came is because I don't want to be picked up in front of my kids by the police."

Given Keener's reluctance to testify, the General Counsel offered into evidence Keener's affidavit, which I accepted over Respondent's objection, and which I now consider as substantive evidence as a past recollection recorded, and rely on in place of the Keener's contradictory oral testimony. See, e.g., *Three Sisters Sportswear Co*., 312 NLRB 853, 865 (1993).

Keener states that in late March, just a few days after he and Hill discussed the union petitions (which Keener incidentally did not sign), Belt asked him if he "was aware of any union activity." Keener responded that he had heard something about the Union, but did not know how far the unionizing effort had gone at L.S.F. Belt then stated that he (Keener) "did not know how much damage a union could do to the company and that a union at L.S.F. could mean [Keener's] job." Keener answered that "we would have to see what happened." Later that same day, Keener called Belt at his home to discuss an unrelated matter, at which time Belt asked Keener his opinion of the Union. Keener replied that he preferred to look at both sides of the issue, and that he believed that the drivers were simply looking for a wage increase and some job security. Belt responded by asking Keener if he "would rather see the drivers earn more money or to see L.S.F. close." Belt did not deny Keener's assertions.

The complaint alleges that Belt unlawfully interrogated Keener by asking him if he was aware of any union activity among employees, and how he felt about the Union. Clearly, Keener was not an active and open union supporter, and indeed did not sign the union petition, and nothing in Belt's questions suggest that he had some legitimate reason for questioning Keener regarding his knowledge or opinion of union activities at the facility. Further, in both instances, the inquiry regarding the Union was initiated by Belt and was followed immediately by what the complaint further alleges, and I find, were clear threats of discharge and plant closure. Nothing in Belt's comments suggest that he had some factual objective basis for his assertion regarding the loss of jobs and probability of plant closure. In view thereof, and as the above remarks were clearly intended to obtain information regarding the protected activities of other employees and occurred within a framework of other unfair labor practices committed by Belt and others, I find that Belt's questioning of Keener and his subsequent threat of discharge and plant closure were coercive in nature and violative of Section 8(a)(1) of the Act. *Midland Transportation Co.,* 304 NLRB 4, 6–7 (1991).

(3) Towards employee Hill

As more fully discussed below, on April 13, the Respondent placed Hill on medical leave presumably until he obtained a full physical examination and was medically released to return to work. Approximately 1 week after being placed on medical leave, Belt called him and asked if he had heard anything from the doctors. Hill responded he had not, at which time Belt told Hill that he was "a little confused on the way [Hill] was going to vote" in the upcoming Board election. When Hill simply stated, "No comment," Belt responded that he had a truck "sitting there, and that it couldn't be sitting." Hill claims he simply said, "[O]h, well," and that the conversation ended at that point.

The complaint alleges that Belt's comment about being a little confused on how Hill was going to vote amounted to an unlawful interrogation, and that his further comment about the truck "sitting there" was an implied threat that Hill could lose his job depending on the outcome of the election. I agree. Belt, as noted, initiated the conversation, in my view, under the guise of seeking to determine if Hill had obtained the necessary

[14] The General Counsel's assertion in her posthearing brief, at p. 60, fn. 27, that Belt actually told Owens that he knew who had attended union meetings and that prounion drivers were on a "hit list," is a mischaracterization of Owens' testimony, for the latter simply testified that this was his interpretation of what Belt meant by his "personal vendetta" remark.

medical release forms. Having received Hill's negative response, Belt then revealed the true purpose of the call, to wit, to ascertain how Hill intended to vote in the upcoming Board election. Although Hill's active involvement with the Union was by now fairly well-known to Respondent, Belt's attempt to ascertain how Hill intended to vote served no legitimate purpose and, when viewed in light of what was clearly a veiled threat of job loss, constituted an unlawful interrogation and threat of job loss, and violated Section 8(a)(1) of the Act. *Hoffman Fuel Co.,* 309 NLRB 327 (1992).

c. Unlawful conduct by Owner Faure and husband Crohan

(1) Towards employee Holland

On March 25, a payday, Holland went to get his paycheck but was told by Day that employees first had to watch a video before receiving their checks. Just prior to watching the video, Faure approached Holland and asked him if he was allowed to talk to her, or if the Union forbade it. When Holland responded that he could talk to her, Faure asked Holland, presumably in the presence of others, why they were bringing in the Union, and stated that Holland would not like what she would do to him if employees pursued the Union, that he would quit and walk away. Following Faure's remark, her husband, Crohan, commented to Holland that they (presumably the employees) were "all chicken-shits for not coming to them first before [they] went to the Union." Crohan added that "for 50 cents an hour he would sit there and promise us the moon, just like the Union did," and that "we could go ahead and bring the Union in, but when we went on strike that he would bring in temporary or replacement workers to replace us." As noted, neither Faure nor Crohan was called to testify. Accordingly, Holland is credited.

The complaint alleges that Faure's above comments to Holland were unlawful and violative of Section 8(a)(1). I agree. Although Holland was an active and open union adherent, Faure's attempt to ascertain his and other employees' reasons for wanting to organize, when viewed in light of her subsequent not so subtle threat that his prounion endeavors would result in certain unspecified reprisals, was coercive and amounted to an unlawful interrogation. While Faure's threat of reprisal was nonspecific, her claim that Holland "would quit and walk away" could reasonably be interpreted as a threat that Faure would make Holland's life at work so unbearable that he would be forced to quit. In these circumstances, Faure's questioning of Holland and her subsequent threat of unspecified reprisals was coercive and violative of Section 8(a)(1). *Hoffman Fuel Co.*, supra.

I also find that Crohan unlawfully threatened Holland and employees in general with job loss when he stated that employees could go ahead and bring in the Union but when employees went out on strike, he would bring in temporary or replacement workers to replace them. Generally speaking, Section 8(c) of the Act permits an employer to make predictions about the consequences of unionization provided its remarks are not accompanied by a threat of reprisal or force or promise of benefit. In *Eagle Comtronics*, 263 NLRB 515 (1983), the Board held that an employer does not violate the Act when it truthfully informs employees that they are subject to permanent replacement in the event of an economic strike, since such a statement is consistent with the Board's holding in *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).[15] Crohan's remark, in my view, exceeds the permissible bounds of free speech permitted under Section 8(c), and by the holding in *Eagle Comtronics*, supra. Thus, rather than expressing his view as to what might possibly occur following the give and take of negotiations, Crohan made it clear to Holland that a strike was inevitable by telling him that Respondent intended to hire replacement workers "***when***" (not "***if***") employees went on strike. If this was not the message Crohan intended to convey, then it was incumbent on him to clarify or explain his strike remark. Absent any such explanation or clarification, Holland could reasonably have interpreted Crohan's remark to mean that Respondent would not be averse to, and indeed might encourage, a strike so that it could hire replacements and discharge the striking employees. Clearly, any ambiguity in this regard must be resolved against Crohan. I therefore find that Crohan's strike remark, especially when viewed in the context in which it was made, e.g., Faure's threat of unspecified reprisal against Holland and Crohan's pejorative description of union supporters as "chicken shits," amounted to a veiled threat of discharge and violated Section 8(a)(1) of the Act. *LRM Packaging,* 308 NLRB 826, 832 (1992).

(2) Towards employee Keener

Keener's testimony, as adduced from his oral presentation at the hearing and his sworn affidavit, reflects that after viewing the video which Respondent had employees watch before receiving their paychecks on March 25, Faure asked him what he thought of the video, and that he responded that he found it to be "very far fetched." Keener claims that on hearing his comment, Crohan "got in [his] face" and said that he "should ask a certain union member how much of his pension benefits he was getting from his union pension fund." Crohan further stated that "L.S.F. would not be able to operate with the union" and Faure added that the drivers "did not know what we had." (See GC Exh. 26, p. 3.)

The complaint alleges that Faure unlawfully interrogated Keener by asking him what he thought of the video. By itself, Faure's inquiry seems somewhat innocuous and hardly coercive and but for the circumstances in which it was made, I would be inclined to dismiss this particular allegation. However, Faure's inquiry occurred immediately after the viewing by employees of the company film, and was immediately followed by Crohan's apparent tirade during which he "got in Keener's face" and told him, inter alia, that the Company would not be able to operate with the Union. Given the circumstances in which it was made, I agree that Faure's comment to Keener was coercive and violative of Section 8(a)(1).

d. Unlawful conduct by Supervisor Burnson

(1) Toward employee Owens

On April 28, 1 day prior to the election, Burnson approached Owens in the Respondent's parking lot and asked, "Do you know how the election is going to go? Do you know who you are going to vote for yet?" Owens replied he did not yet know how he was going to vote, adding that "[i]f I vote with my

[15] Under *Laidlaw,* permanently replaced economic strikers who have made unconditional offers to return to work are entitled to full reinstatement when positions become available and to be placed on a preferential hiring list if positions are not available.

head, I go with the Union; if I vote with my loyalty, I go with my heart which is Amy [Faure]." Burnson retorted, "I hope you vote with your heart." Burnson did not testify and Owens' undisputed account is credited.

The complaint alleges, and I find, that Burnson unlawfully interrogated Owens by asking him how he was going to vote in the election. Owens, as previously found, was not an active and open union supporter, and Burnson's inquiry of Owens served no legitimate purpose and was obviously designed to ascertain where Owens' sympathies lay. As the Board noted in *Advo System*, 297 NLRB 926, 933 (1990), an employee's view regarding unionization may be kept to himself and his freedom of choice should not be influenced by the employer's knowledge or suspicion about those views. Accordingly, Burnson's questioning of Owens on how he intended to vote was coercive and violated Section 8(a)(1).

(2) Towards employee Michaels

Burnson also interrogated Michaels in the parking lot on April 28, on how he was going to vote. Michaels replied that he "was kind of unsure because if I would have voted yes, then I would have the company upset with me, and if I voted no, that I would have had the drivers upset with me." Michaels stated that they then engaged in some small talk but that soon thereafter Burnson again asked him pointblank, "which way are you going to vote?" and he responded, "None of your business." Michaels' above testimony is undisputed and is credited.

The reasoning set forth above regarding Burnson's inquiry of Owens is equally applicable here. Accordingly, I find for the above stated reasons that Burnson's inquiry of Michaels regarding how he expected to vote was coercive and violative of Section 8(a)(1) of the Act. *Advo System,* supra.

e. Faure's April 25 letter to employees

In her April 25 letter to employees entitled "**What Will Local 142 Bring to the Table**," Faure informed employees that the Union at one time represented its employees but were voted out in 1986, and suggested to employees that they ask those who were present in 1986 why the Union was voted out. (R. Exh. 40, p. 7.) The letter went on to state that:

> Irregardless of those reasons, all of you who are in the eligible voters group should clearly understand that you are "gambling with"—current wages, benefits and terms and conditions of employment. *If you vote to have Local 142 represent you, all of your current wages, and benefits will be frozen during any negotiations for a contract*. Once the contract is negotiated, it (the contract) will establish your wages, benefits and terms and conditions of employment." [Emphasis added.][16]

The complaint, as noted, alleges, and the General Counsel contends in her posthearing brief, that the above statement constitutes an unlawful threat to employees that their wages and benefits would be frozen because of their support for the Union. I agree. It is well-settled that once the Union is voted in as the bargaining representative of Respondent's employees the Respondent remains obligated to continue in effect its existing wage and benefit policies until such time as the parties bargain in good faith to agreement on any proposed change to the policies or to an impasse in negotiations. Faure's letter, however, makes clear that the Respondent intended to freeze employee wages and benefits at their current levels without regard to any right employees may have had under existing policies or practices to receive periodic wage increases and/or increases in benefits. In these circumstances, Faure's letter amounted to a threat to deprive employees of existing benefits if they supported the Union, and violated Section 8(a)(1) of the Act. *299 Lincoln Street, Inc.,* 292 NLRB 172, 174 (1988).

2. The 8(a)(3) allegations

a. The issuance of the company policy and procedures manual

The complaint alleges that on April 8 the Respondent instituted, and has since maintained, new work rules for drivers, and that its purpose in doing so was to discourage employee support for the Union. Despite the Respondent's denial in its answer that it did not implement any new work rules, the General Counsel introduced into evidence, without objection from the Respondent, a manual entitled, "LSF Transportation Driver Company Policies and Procedures," which Belt identified as work rules that were issued by Respondent in April (G.C. Exh. 10). The evidence therefore confirms, contrary to Respondent's denial, that new work rules were in fact enacted and implemented soon after the Respondent learned of the Union's campaign to organize its drivers. The question remains whether the implementation of the work rules was discriminatorily motivated.

Applying the causation test established by the Board in *Wright Line,* 251 NLRB 1083 (1980),[17] for determining whether employer conduct violates Section 8(a)(3) and (1), I find that there is sufficient, credible, and undisputed evidence to support the inference that the enactment of the work rules was motivated by antiunion considerations. Thus, there is no question that Respondent knew, as early as March 21, when it unlawfully interrogated Michaels about the union meeting held the day before, that its drivers were engaged in an organizational drive. The Respondent's suspicion in this regard was subsequently confirmed on March 22, when Belt received the "Open Letter to Management," signed by Holland, Hill, and Hasse. Furthermore, just 3 days prior to enacting the rules in question, the Respondent had agreed to a Board-conducted

[16] Faure's April 25 letter was not the only document in which "frozen wages and benefits" was discussed. Thus, Respondent also distributed a document entitled, "QUESTIONS AND ANSWERS," responding hypothetically with "facts" to questions employees may have as to what would occur if the Union won the election. One such question dealt with the effect a union victory would have on the employees' "current wages and benefits." In response to this hypothetical question, the document stated that: "Your current wages and benefits will be frozen with no changes during the negotiation of a contract. In fact, any wage increases that go to any other facilities or employees here at Field Street who are not part of the election group cannot be implemented here. It is likely that negotiations may take a long time—even up to one year. Your wages and benefits would be frozen at current levels for the period of negotiation until a final agreement is reached."

[17] Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983). Under *Wright Line,* the General Counsel bears the initial burden of showing that respondent's actions were motivated, at least in part, by antiunion considerations. In making out a prima facie case, the General Counsel must show that employees had engaged in union or other protected activity, that the employer knew of such activities, and that it harbored animosity towards the employees or the union. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

election to decide whether its drivers wished to be represented by the Union. Respondent's knowledge of its employees' union activities is therefore irrefutable. Respondent's antiunion animus is also well established and evident by the course of unlawful conduct on which it embarked on learning of its employees' activities. Such conduct, as found above, included the repeated interrogation of suspected union supporters, and threats of plant closure, discharge, and other reprisals. Given these facts, an inference is warranted that the Respondent's enactment of the work rules, just 3 days after agreeing to an election, was motivated by antiunion considerations.[18] As the General Counsel has satisfied her *Wright Line* burden of proof, the burden now shifts to the Respondent to demonstrate that the work rules would have been enacted even if employees had not engaged in any union activity. In this regard, the Respondent offered no explanation either during the hearing or in its posthearing brief for its decision in this regard. Consequently, the General Counsel's prima facie case remains unrebutted, warranting a finding, which I make here, that the enactment of the work rules violated Section 8(a)(3) and (1) of the Act, as alleged.

b. The policy change on use of ComData cards

The General Counsel contends in her posthearing brief that Respondent further violated Section 8(a)(3) and (1) by discontinuing the practice of allowing drivers to obtain cash advances with their company credit card, known as a ComData card. The record reflects that Respondent issued these ComData cards to drivers to enable them to purchase fuel and for emergency purposes. It is also undisputed that prior to March 27 employees were permitted to use the cards to obtain cash advances to pay for meals, etc., which would then be automatically deducted from their paychecks. On March 27, soon after learning of the employees' union activities, the Respondent issued a memo restricting the use of the ComData cards for fuel purchases only, and prohibiting employees from obtaining cash advances (G.C. Exh. 19). The memo states that the change in practice resulted from driver abuse of the cash advance privilege.

I agree with the General Counsel that the change in policy was unlawful. Clearly, the timing of the change in policy, just a few days after Respondent learned of the drivers' activities, coupled with its demonstrated hostility towards the Union, affords a sufficient basis for drawing an inference that antiunion animus was a motivating factor in Respondent's sudden change in policy regarding employee use of the ComData card. *Masland Industries,* 311 NLRB 184, 197 (1993). In these circumstances, I find that the General Counsel has made a prima facie showing that the change in policy was motivated by antiunion considerations. The Respondent has presented no evidence, and indeed made no argument at the hearing or in its posthearing brief, to refute the General Counsel's prima facie case. The only explanation found for the change in policy is the statement in General Counsel's Exhibit 19, that employees had been abusing the ComData card privileges. However, an employer does not satisfy its *Wright Line* burden simply by presenting a legitimate reason for its action, but must instead persuade by a preponderance of the evidence that the same action would have occurred even in the absence of the employees' protected conduct. *Peter Vitale Co.,* 310 NLRB 865, 871 (1993). Here, the Respondent could have, but did not, present credible oral or documentary evidence to substantiate the claim of driver abuse of the ComData cards asserted in General Counsel's Exhibit 19. As the General Counsel's prima facie case remains unrebutted, I find that termination of the drivers' cash advance privilege was purely retaliatory in nature and a direct response their involvement with the Union. By its conduct, the Respondent sought to discourage further employee support for the Union and thereby violated Section 8(a)(3) and (1) of the Act.

c. The change in work assignments/suspension/discharge of individual drivers

(1) Mark Hasse

Hasse was hired by Respondent on January 13 and, except for an occasional long haul, was primarily assigned to local runs. On March 23, as found above, Day unlawfully interrogated Hasse about his union activities. Hasse credibly testified this conversation occurred at approximately 1 p.m., after he had finished his local runs, and that immediately after making her comment, Day informed him that he was through for the day and that due to a lack of work, he would not be working the following day, Friday. Hasse credibly and without contradiction testified that his normal workday lasted anywhere from 10 to 15 hours per day. When sent home by Day, Hasse had only worked 7 hours. He further testified, again without contradiction, that he had never previously been asked to take a day off. The following day, Friday, Hasse called Day at approximately 9 a.m. to inquire about work, and was told there was still no work available. Day further informed him that on Monday, he was scheduled to go out on a long haul to Indianapolis. Hasse admits having done long hauls to Indianapolis "on very few occasions." Hasse recalls having done two Indianapolis runs in a row, and that on March 28, he was assigned another long haul to East Alton, Illinois.

In the early morning of March 28, Hasse arrived at the Hammond terminal of the Great Lakes warehouse to pick up his cargo for the East Alton trip. On receiving his paperwork, he inspected the truck, noticed that it had been loaded and sealed, and began his drive to East Alton. On the way, Hasse came across a weigh station at Springfield, Illinois, and at that time learned that his truck was 4900 pounds' overweight. Hasse received a citation for the overweight vehicle and was not permitted to continue until the weight was brought within legal limits and the fine of $562 paid.[19] Hasse testified, without contradiction, that he notified Belt that same morning about the ticket. The record reflects that Hasse made another trip on March 29. On March 30, Day asked Hasse to come in early on March 31. As instructed, Hasse reported for work on March 31 and was told Belt wanted to speak with him. Hasse then met with Belt in his office and after asking Hasse about the ticket, presented him with a form to sign authorizing Respondent to deduct the cost of the fine from his paycheck. Hasse objected to paying the fine, stating that this was not a moving violation

[18] *Equitable Gas Co.,* 303 NLRB 923, 928 fn. 17 (1991). ("Antiunion motivation may be reasonably inferred from various factors including an employer's expressed hostility toward a union together with its knowledge of the employee's union activities.")

[19] Eventually, another driver was sent to remove the excess cargo, which consisted of several pallets of beer that had erroneously been loaded in Hasse's truck. This additional freight was not listed on the bill of lading, which on its face gave no indication that Hasse's truck and cargo exceeded the maximum allowable weight of 80,000 pounds. Respondent also paid the $562 fine.

for which he should be responsible, but that the overweight fine was a company ticket for which the Company, not the employee, is responsible. Belt, according to Hasse, insisted that Hasse was responsible for paying the fine, and showed Hasse a copy of a memo dated January 9 which advised employees that all loads were to be scaled, and that where a driver was "irresponsible" in this regard, "he must pay for the fines or cost incurred." (See R. Exh. 1.) Hasse informed Belt that he had never before seen the January 9, memo on scaling, and had never initialed a copy of the memo.[20] Belt nevertheless insisted that Hasse pay the fine, and stated that if he refused, he would be terminated. When Hasse reiterated his position, Belt purportedly told him to clean out his personal effects from his tractor, and to turn in his cellular phone and beeper.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) when Day sent Hasse home early on March 23, and laid him off for 1 day on March 24, and by thereafter discharging him on March 31. The General Counsel has made out a prima facie case that Respondent's conduct was motivated at least in part by Hasse's involvement with the Union. The record evidence clearly establishes, and the Respondent does not dispute, that Hasse was an active and open union supporter and that Respondent was fully aware of his prounion sympathies and activities. Hasse, for example, signed both the petition and the "Open Letter to Management," and also wore a bright orange button with the words "UNION YES" on his jacket for all to see. Respondent's knowledge of his prounion sympathies is evident from the fact that Belt received the "Open Letter to Management" and from Day's inquiry as to why Hasse was behind the union movement. Further, as found above, the numerous incidents of unlawful interrogations and threats engaged in by most of Respondent's managerial staff establish quite clearly the antiunion animus which Respondent harbored towards the Union and its supporters.

Regarding the allegation that Respondent discriminated against Hasse for his union activities by sending him home early on March 23, and laying him off for an alleged lack of work on March 24, the Respondent offered no explanation or justification, either at the hearing or in its posthearing brief, for its conduct in this regard. The timing of Day's decision to send Hasse home early and not to assign him any work for the following day, occurring as it did immediately after her unlawful interrogation of him and his response that it was his right to unionize, supports the General Counsel's assertion that Day's decision was motivated by antiunion considerations. As the Respondent failed to present any evidence, testimonial or otherwise, to rebut the General Counsel's prima facie case, a finding is warranted that Respondent violated Section 8(a)(3) and (1) when Day sent Hasse home early on March 23, and laid him off for 1 day on March 24.

As to the allegation that Hasse was unlawfully discharged for his union activities, the Respondent contends that Hasse was not terminated but instead chose to voluntarily quit his employment rather than reimburse Respondent $560 for the fine it paid on the overweight citation received by Hasse. The Respondent points out that Hasse's failure to scale his load before embarking on his trip to East Alton was a breach of its January 9 policy (R. Exh. 1), rendering him liable for the fine he received, and contends, through testimony provided by Belt, that when asked to sign a form authorizing Respondent to make deductions from his paycheck, Hasse declined to do so and left the office.

The Respondent's contention that Hasse quit and was not terminated rings hollow and is simply not believable. Initially, I credit Hasse over Belt as to what occurred and was said during the March 31 meeting. Hasse appeared to be testifying in an honest and forthright manner. Belt, on the other hand, exhibited a poor demeanor on the witness stand, at times seemed confused by questions posed to him by Respondent's counsel, and often was able to recollect events only after being prompted by leading questions from counsel. Thus, I accept as true Hasse's claim that during the March 31 meeting Belt demanded that he sign the payroll deduction form or face termination, and that when he declined to do so Belt ordered him to clean out his personal effects from his tractor and to turn in his cellular phone and beeper, effectively discharging him. Indeed, Belt's own testimony would seem to undermine Respondent's claim that Hasse quit on March 31. Thus, in describing what Hasse said and did after being asked to reimburse Respondent, Belt stated only that Hasse simply left the office after expressing his unwillingness to pay the fine, and made no mention of Hasse ever having verbalized an intention to quit over this matter.

The Respondent's suggestion that Hasse was fully aware of the January 9 policy mandating that all loads be scaled and requiring an "irresponsible" driver who failed to do so to pay the fine, and that he quit rather than comply with the policy's requirements, is contrary to the credible evidence of record. Hasse, as noted, testified in a credible and uncontroverted fashion that he was unaware of the existence of such a policy, and further testified, consistent with the testimony of other drivers, that during a February meeting drivers were told to use their own judgment in deciding which loads to scale. While there is no question that Hasse did not scale the East Alton load he delivered on March 28, Hasse's decision not to do so was consistent with Respondent's discretionary scaling policy announced to drivers in February.[21] Having found that Hasse was terminated by Respondent, and that it has not come forth with a legitimate, nondiscriminatory reason for doing so, the General Counsel's prima facie showing that Hasse was terminated for his union activities remains intact. Accordingly, I find that Hasse's termination on March 31 violated Section 8(a)(3) and (1) of the Act.

[20] Hasse testified, credibly and without contradiction, that when a new company policy was instituted, the practice was to furnish each employee with two copies of the policy, one of which would be initialed and placed in the employee file, and the other was to be retained by the employee.

[21] Nor was there any reason for Hasse to believe that the East Alton load would need to be scaled since the combined weight of the tractor-trailer and the cargo contained therein, as per the bill of lading given to Hasse, would have been well below the maximum allowable weight of 80,000 pounds. As it turned out, an error had been made by the loaders, which was not reflected in the bill of lading, that caused the truck to become overweight. Clearly, this was not Hasse's doing. Thus, Respondent would not have had any basis for insisting that Hasse pay the fine under its January 9 policy since he was not the "irresponsible" party in this matter. In fact, Belt readily admitted that where extra product was loaded onto a truck and not reflected on the bill of lading, the individual or individuals responsible for loading the truck would be responsible. (Tr. 38.)

(2) Ron Holland

Holland had been employed by Respondent as a truckdriver from July 1993 until his discharge on April 7.[22] His signature on the "Open Letter to Management," and his actions in delivering it in person to Belt, clearly identified him to Respondent as an open and active union supporter and establishes Respondent's knowledge of his activities. From about December 1994 to March 23, Holland primarily drove long-distance mileage runs, and averaged weekly earnings of approximately $750–$800. Holland would on occasion be asked to drive a short run but only when no one else was available to do so. Beginning March 23, just 2 days after delivering the "Open Letter to Management," the Respondent began assigning Holland to short runs, which effectively reduced his weekly take-home pay to about $450 to $460. On March 31, Holland was issued a written warning by Belt for having an overweight truck. When Holland reminded Belt that they had been instructed during the February meeting to use their own discretion in deciding whether or not to scale, Belt simply responded that company policy required that all loads be weighed, and that this had been set forth in a January 9 memo. Holland, however, insisted that he had never seen such a memo, at which time Belt asked him if he wanted a copy of the memo, and Holland replied he did. Holland claims that that same day, he found a copy of the January 9 memo in his company mailbox.

On April 7, Holland was assigned to drive a load to East Alton, Illinois. The record reflects that he picked up the load at approximately 12:30 a.m. from Respondent's facility and made the delivery at about 7 a.m. While there, Holland called the office at which time he was dispatched to pick up a "backhaul" in St. Louis, Missouri.[23] On arriving at St. Louis, Holland had to wait for the shipment to be loaded and eventually left St. Louis at approximately 12:30 p.m. with the backhaul and headed for Respondent's facility. Holland testified, credibly and without contradiction, that 70 percent of his runs usually entailed a backhaul and that the Respondent's practice regarding backhaul loads was to have the driver bring the load back to the Hammond warehouse where it would be reassigned to another local driver for delivery. His testimony in this regard was corroborated by Michaels, Hill, Hasse, Kawa, and indeed Belt himself. (Tr. 35.) On his way back to Hammond, Holland called the office and was instructed by backhaul dispatcher Qualls to deliver the shipment directly to its destination in Niles, Illinois. Holland advised Qualls that he did not have sufficient DOT hours remaining to complete the trip to Niles, and stated that he would take the load to the Hammond facility, take his 8-hour break, and then deliver the backhaul himself.[24] Qualls then put Belt on the phone at which time the latter informed Holland that he wanted the delivery made directly to Niles and that Holland should continue towards Niles until his DOT hours had been used up, take his break, and then proceed to make the delivery. Holland, however, declined to do so, and repeated that he would return to the Hammond facility and drop off the backhaul load. It should be noted that Holland had anticipated being able to return to the Hammond facility by 5 p.m. to pick up his children, as he was customarily allowed to do every other Friday.[25] According to Holland, Belt then told him to bring the truck back to Respondent's facility and clean out his things. Holland did so, arriving at the Hammond facility at about 5 p.m.

The complaint alleges that Respondent discriminated against Holland because of his union activities by assigning him after March 23 to short runs only, resulting in a loss of pay, issuing him a warning for not scaling an overweight truck, and discharging him for failing to take the overhaul load to Niles. I find merit to these allegations.

The General Counsel has sustained his *Wright Line* burden of proof with respect to each one of these allegations. There is, as noted above, no question that Holland was an active and open union supporter, that Respondent was fully aware of his activities, and that it harbored animus towards the Union and its supporters. Regarding the reassignment of work, the Respondent's answer denies the allegation that Holland's work assignments changed after March 23. Holland testified that when he returned to work for Respondent in December 1994, he informed both Belt and Day that he was interested in doing only long runs, and that from that time until March 23, 95 percent of his trips involved long runs. He further testified that on or about March 23 the Respondent began assigning him to only local runs, resulting in a decrease in his take-home pay. Not only is Holland's above testimony uncontroverted, it is also supported by Respondent's own payroll records (see R. Exh. 2). Thus, the payroll record reflects that during the week ending March 30 Holland's hourly based earnings increased significantly in comparison to hourly earnings of prior weeks, indicating clearly that he had a marked increase in the number of local runs assigned to him during the week of March 23. Conversely, his mileage earnings for the same period dropped dramatically, suggesting that Holland had fewer long haul runs during the week of March 23. While Holland readily admits that his overall earnings for the 6-week period preceding his discharge exceeded that of other drivers, the payroll records support his claim that his take-home pay decreased after being assigned to do short hauls on March 23.[26] I credit Holland's above undisputed testimony and find that on or about March

[22] Holland apparently had a break in his employment from October to December 1994.

[23] A backhaul occurs when a driver, after delivering an initial load to a particular destination, is asked to pick up a load at another destination and deliver it back to the Hammond terminal. On rare occasions, a driver might be asked to deliver a backhaul directly to its destination instead of returning it to the terminal. However, Holland testified, credibly and without contradiction, that during his entire 2-year employment with Respondent he had only had to do this on one occasion, and that he did so because the backhaul load was a mileage run and the destination was nowhere near the Hammond facility.

[24] Holland in fact had approximately 5 hours remaining. However, it appears that with the rush hour traffic in Chicago, it would have taken Holland anywhere from 6 to 7 hours to deliver the load to Niles, which would have put him over the allowable 15-hour DOT limit.

[25] Holland was a divorced parent who had custody of his children every other weekend. The credible evidence of record reveals that the Respondent was fully of his situation and accomodated him by permitting him to return to home by 5 p.m. every other Friday to pick up his children. Holland testified that there was no requirement he submit in writing his request to be home early on such days, as testified to by Belt. Holland's testimony in this regard is corroborated by Olson, and is credited.

[26] Thus, his take-home pay for the week ending March 30, was approximately $459.23. However, his earnings for the weeks ending March 23, 17, 9, and 2 were respectively $707.80, $907.44, $1038.77, and $774.29. For the week ending April 6, it appears that Holland was back to doing primarily long hauls since his weekly hour and mileage earnings for that week approximate the weekly hour and mileage earnings for periods preceding the week of March 23.

23, Holland was indeed reassigned to do mostly short runs resulting in a decrease in his weekly take-home pay. The sudden and unexplained change in his work assignment, its timing, e.g., just 2 days after Respondent learned of his involvement with the Union, and Respondent's antiunion animus, provide a sufficient basis for inferring that Holland's reassignment to short hauls for the week beginning March 23, was retaliatory in nature, and was intended to punish Holland for his prounion stance. The Respondent offered no explanation or justification, either by way of evidence or through simple argument in its posthearing brief, for the sudden reassignment of Holland to such duties. As the Respondent produced no evidence to refute the General Counsel's prima facie case, I find that Holland's March 23 reassignment to local runs was discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act.

The Respondent also failed to refute the General Counsel's prima facie showing that antiunion animus was a motivating factor in the Respondent's decision to issue Holland a warning for not scaling a load. The Respondent, in its answer, initially denied having issued such a warning, but when confronted with Holland's undisputed testimony that he received the warning on March 31, and documentary evidence establishing that one was issued to him (G.C. Exh. 6[a]), suggested implicitly that the warning was justified because Holland violated company policy, as set forth in the January 9 memo, requiring the scaling of all loads.[27] However, Holland was not only unaware of such a policy prior to being disciplined for its alleged breach, but for reasons of economy that policy, as found above, had been effectively rescinded by Belt less than 1 month after its enactment. Under these circumstances, the issuance of the warning to Holland for failing to scale a load, occurring as it did just days after Respondent learned of his union activities and following closely on the heels of his unlawful change in his driving assignments, was clearly retaliatory and intended as a message to Holland and others that their support for the Union would not go unpunished. The Respondent's shift in position from initially denying in its answer that it issued such a warning to its implicit argument at the hearing that the warning was justified because Holland had violated its January 9 scaling policy, a policy which, as found above, was rescinded a month later, serves to further underscore the pretextual nature of its claim, and warrants a finding that the warning violated Section 8(a)(3) and (1) of the Act.

As to his discharge on April 7, the Respondent contends that Holland was lawfully terminated for insubordination stemming from his refusal to make the backhaul delivery to Niles. The General Counsel has made a prima facie showing that Respondent was motivated at least in part by antiunion considerations when it discharged Holland. As found above, the Respondent was fully aware of Holland's active role in the Union's organizing campaign and was vehemently opposed to his and other employees' activities in this regard, so much so that it felt compelled to interfere with its employees' involvement there by engaging in, inter alia, unlawful threats, interrogations, and other unlawful conduct all designed to thwart their organizational drive. Holland was on the receiving end of some of this unlawful conduct which included, as noted, a direct threat from Faure that she would make Holland's employment with Respondent so unbearable that Holland would want to quit rather put up with the harassment that inevitably would follow if he persisted in his union activities. Thus, when viewed against this background, one may reasonably infer, as I do here, that Respondent's discharge of Holland on April 7, just 1 week after issuing him an unlawful warning, was retaliatory in nature and motivated by antiunion considerations.

The Respondent contends that it lawfully discharged Holland for insubordination when he refused to comply with Belt's directive on April 7 that he deliver the backhaul load directly to Niles. Although Holland testified he refused to deliver the load at that time[28] because he did not have sufficient DOT hours to complete the run, the evidence suggests that Holland was also eager to return to the Hammond facility in time to pick up his children, as it was his practice to do every other week (see fn. 25, supra), and that this, along with the shortage of DOT hours, were the reasons for his reluctance to make the Niles run. The only explanation provided by Belt as to why he did not want Holland to return the backhaul load to the Hammond facility for delivery by another local driver was because the Niles cargo presumably had been designated a "hot load." Other than Belt's self-serving explanation in this regard which was raised for the first time at the hearing, there is no evidence to support Belt's assertion that the Niles run was a "hot load." The record, for example, reflects that during the several hours Holland had to wait in St. Louis for the Niles shipment to be loaded into his trailer, no mention was made to him that the shipment had to go directly to Niles or that it was a "hot load." In fact, it was only when he was en route back to Hammond with the Niles shipment, and only after he called the L.S.F. office to check in, that Qualls mentioned to him for the first time that Respondent wanted the backhaul load delivered directly to Niles rather than being returned to its facility, as was the customary practice. Thus, while Holland readily admits being told by Qualls that the shipment had to go directly to Niles, he testified that neither Qualls nor Belt advised him that this was a "hot load." Qualls was not called as a witness to refute Holland's claim in this regard, and Belt, who did testify, did not contradict Holland on this point. Accordingly, I credit Holland's assertion in this regard and find that he was never told that the Niles shipment was a "hot load." Further, I find, given the lack of evidence to the contrary, that the Niles run had never been designated a "hot load" as suggested by the Respondent. Why then did Belt insist that Holland make the delivery rather than return the load to Respondent's warehouse? The answer becomes readily apparent when one considers Belt's conduct in light of Faure's earlier threat to make life so difficult for Holland that he would simply "quit and walk away." I am convinced that the Respondent, knowing full well that Holland anticipated being back at its facility by 5 p.m. to pick up his children, and knowing full well that Holland could not make the run without violating DOT regulations,[29] insisted that Holland complete the run to

[27] Holland testified he found the warning in his company mailbox. As the warning was signed by him on March 31, Holland presumably signed the warning after finding it in his box. Although the Respondent did not take a position, either at the hearing or in its posthearing brief regarding the warning issued to Holland, it would appear from the questions directed at Holland on cross-examination and from the position taken regarding employee Hasse's alleged breach of this policy, that Respondent, despite the initial denial that such a warning was issued to Holland, is arguing implicitly that the warning was justified.

[28] Holland did offer to make the run, provided he were permitted to return the load to Hammond and after taking his required 8-hour break.

[29] The Respondent, it should be noted, did suggest to Holland that he continue until he ran out of hours, take his required time off, than proceed to make the delivery. No explanation, however, was provided as

Niles in the hope that Holland would, as predicted by Faure, simply "quit and walk away" rather than be unable to pick up his children. I am equally convinced that the Respondent conjured up the "hot load" theory as a way of justifying having deviated from its established past practice of returning all backhaul loads to its own facility for subsequent delivery by a local driver. While there is no doubt that Holland declined to make the Niles run at that particular time, the Respondent's failure to provide a credible explanation for deviating from its past practice persuades me that it was deliberately setting up Holland in the hope that he would quit or, if he failed to do so, provide Respondent with some excuse for terminating him if he failed to comply with Belt's directive. As the Respondent's explanation for the discharge lacks evidentiary support, I conclude it has failed to rebut the General Counsel's prima facie showing that Holland's discharge was motivated by Respondent's desire to rid itself of one of the Union's leading adherents and, accordingly, violated Section 8(a)(3) and (1) of the Act.

(3) Michael Dooley

Dooley had been employed primarily as a long-run driver from September 1994 until his discharge on April 4. Sometime in November 1994, Dooley made a run to Frank's Nursery in Ohio, accompanied by his dog (Dakota). Dooley testified that he frequently carried Dakota with him on long hauls, and that Respondent was fully aware of his practice and did not object or otherwise prohibit him from doing so. On November 4, however, following his arrival at Frank's Nursery, and while outside the cab of the truck, Dakota "bit" a Frank's employee, causing a small abrasion. The matter was reported to the police and immediately thereafter Dooley attempted to notify Respondent of the incident. Dooley testified that he called his wife at home who got him dispatcher Olson's phone number, at which time he called Olson and explained what had happened. Olson informed him that she would report the matter to Belt, and instructed Dooley to come in the next day and talk to Belt about it. The next day, according to Dooley, he met with Belt and Olson. Belt told him he should not have had the dog with him, to which Dooley responded that he was unaware that such conduct was prohibited. Belt replied that Olson should have informed him of the restriction to which Olson, according to Dooley, replied she had not done so. Belt then instructed Dooley to refrain from carrying his dog on runs. Olson corroborated Dooley, testifying that a meeting was in fact held with Belt the day after the incident, and agreeing for the most part with Dooley's version of what was said. Olson also testified that Belt may have told Dooley that "if L.S.F. got sued or repercussions came from it, that at that point something would have to be done." Dooley, according to Olson, assured Belt that his homeowner's insurance would cover any potential liability and that there would be no repercussions to L.S.F. arising from the incident. After the dog-biting incident, Dooley stopped taking Dakota on his runs. On or about March 13, Dooley received a letter from an attorney representing the individual who had been bitten by Dakota.[30] Immediately upon receipt of the letter, Dooley showed it to Belt, and informed him that his insurance company was taking care of the problem and that L.S.F. would not be involved. Belt thereafter made a copy of the letter purportedly for his file.

Dooley, as noted, signed the union petition on March 20, and the next day began wearing a prounion button on his jacket. He also attended several union meetings. Within days of signing the petition and during the time he began wearing his button, Faure, according to Dooley, approached him as he sat in the main office and, in front of the office staff, said to him, "You lied to me." When Dooley asked what she was referring to, Faure replied, "You said you liked working here." Dooley responded that he did and then remarked, "Wait a minute; if you are going to yell at me, I am going to clock back in," to which Faure replied, "This is private property, buddy; You cross that line, you live with it." Following his exchange with Faure, Dooley was approached by another employee, identified only as Sharon, who told him she had overheard Faure yelling at him, and inquired if Dooley would be returning to work the following day. Dooley said he would, and inquired of Sharon why she was asking, to which Sharon replied, "Well, I just wanted to know if you quit." Dooley responded that he was "not going to get into a kissing contest with it because I can't win." Faure, as noted, was not called to refute this or any other statement attributed to her by Dooley and other employee witnesses. Accordingly, I credit Dooley and find that Faure made the above comments.

Dooley testified that before he began wearing the union button, his driving assignments for the most part involved making long hauls to Carbondale, in southern Illinois, and that he performed these runs anywhere from three to five times a week. He claims that after he started wearing the button, he had fewer mileage hours and accordingly experienced a reduction in wages. Record evidence supports Dooley's assertion that a change in assignment from primarily long haul driving to short haul assignments occurred sometime after Respondent learned of his union activities. Thus, according to Respondent's Exhibit 2, most of Dooley's earnings for the pay periods ending "3–2–95, 3–9–95, and 3–23–95" stemmed from the long-haul mileage runs which he performed, rather than hourly based local runs. However, the pay periods ending "3–30–95 and 4–6–95" show a significant increase in his hourly based earnings as well as a dramatic decrease in mileage based income, in contrast to the prior pay periods mentioned above.[31] It is further evident from a comparison of his earnings after he became involved in union activities on March 20, with earnings prior to

to why, if it did not object to Holland taking his required 8-hour break, it could not simply have allowed Holland to return the load to Respondent's warehouse and immediately reassigned to another driver for immediate delivery to Niles. In this manner, Respondent would have avoided Holland going over the allowable number of DOT hours, permitted him to be home in time to pick up his children, and avoided the 8-hour downtime that would have resulted if Holland were to take his 8-hour break while en route directly to Niles, as Respondent had proposed. While I do not profess to tell the Respondent how to conduct its affairs, it is patently obvious to me that Respondent's above suggestion to Holland that he take his 8-hour break while en route to Niles was inconsistent with its asserted claim of urgency regarding the delivery of the Niles shipment.

[30] The letter, addressed only to Dooley, makes reference to an incident that occurred on "11/09/44" without mentioning that it involved a "dog-bite," and suggests that Dooley refer the letter to his insurance company (see G.C. Exh. 8).

[31] Dooley's hourly (H) and mileage (M) earnings for the periods in question are:

3–2–95	3–9–95	3–17–95	3–23–95	3–30–95	4–6–95
$121.88H	106.25H	16.50H	246.88H	500.00H	253.13H
$816.51M	742.40M	884.26M	707.54M	158.34M	88.92M

such involvement, that the assignment of local runs netted him a reduction in his overall earnings.

Belt testified that he first learned of the "dog-biting" incident when Dooley showed him the letter, which he claims was presented to him on April 3, not in mid-March as asserted by Dooley. However, except for stating that Dooley showed him the letter on April 3, Belt offered little in the way of specifics as to what he and Dooley may have said to each other on April 3. Belt claims that he thereafter decided to terminate Dooley for having violated company policy prohibiting the carrying of an unauthorized passenger in a company vehicle, and that he did not consult with anyone regarding the termination. Dooley provided a somewhat different version of the discharge. Thus, he states that on returning from a run to Champaign, Illinois, he returned his empty trailer to Respondent's Great Lake warehouse and went to Belt's office, as Day had instructed him to do. Soon after going into Belt's office, Helton appeared and told Dooley he was being terminated for "putting the company in jeopardy" by carrying an unauthorized passenger in his truck. Dooley responded that he had never been told about such a prohibition, to which Belt replied, "Well, I don't know why you weren't told, but if you have to make a response, make it on this, on your discharge, on your termination form." According to Dooley, at no time did either Helton or Belt explain who the unauthorized passenger was they were referring to, or when the incident was alleged to have occurred. However, when shown the termination notice (see G.C. Exh. 11), Dooley, believing that the incident in question related to the November "dog-biting" incident, told Helton and Belt that the incident occurred in November 1994, not April 3, as indicated on the notice. Either Helton or Belt then changed the date of the incident on the discharge form to conform to the November 9, 1994 date provided to them by Dooley. Dooley explained that while neither Helton nor Belt informed him who the passenger was, except for the November 9, incident when he had his dog, Dakota, in his truck, he had not carried with Dakota, or any other human passenger, in his truck since that incident, and did not do so on April 3, the date stated on the discharge form. Absent any explanation, Dooley reasonably surmised that Helton and Belt were referring to the November 9 incident, and this appears to be so given the fact that either Helton or Belt thereafter changed the date of the incident to coincide with the November 1994 "dog-biting" incident.

I do not credit Belt as to when he first learned of the "dog-bite" incident. Rather, I find, as testified to by Dooley and corroborated by Olson, that Belt was informed at a meeting held between himself, Dooley, and Olson the day after the incident in November, and that Dooley informed Belt sometime near mid-March of the letter he received from the attorney regarding the incident. In discrediting Belt's version, I note that Respondent's own brief, which states that "[s]ometime in March 1995, the Employer was put on notice by Dooley of a claim for personal injuries arising out of the November dog incident" (R. Br. 10), amounts to a repudiation of Belt's sworn testimony that he first learned of the incident on April 3, when Dooley purportedly showed him the attorney's letter (Tr. 38–39). I also credit Dooley's claim that Helton was present at the discharge meeting and reject Belt's assertion that he acted alone. Of significance in this regard is the fact that despite being called as a witness by Respondent and testifying on other matters, Helton was not asked about and did not deny Dooley's claim as to his involvement in the discharge meeting. The Respondent's failure to corroborate, through Helton, Belt's claim that he acted alone warrants an adverse inference that if questioned on this matter Helton would not have corroborated Belt. *Guardian Industries Corp.,* 319 NLRB 542, 543 (1995). Nor was Belt's testimony a picture of clarity. When asked, for example, whether a decision was made regarding Dooley's continued employment after receipt of the letter, Belt responded, "No," and when asked further by Respondent's counsel whether Dooley had been terminated, Belt again answered, "No." Only when prodded by a surprised Respondent's counsel did Belt admit he was getting confused and finally aver that Dooley had indeed been terminated. Given the above and Belt's overall poor demeanor on the witness stand, I reject his testimony regarding the specifics surrounding Dooley's termination.

The complaint alleges, and the General Counsel in her posthearing brief contends, that the Dooley's reassignment of work to primarily local runs, with a concomitant loss in pay, and his subsequent discharge, resulted from his involvement in union activities, and violated Section 8(a)(3) and (1) of the Act. I find merit in these contentions.

Dooley's involvement in union matters, and Respondent's knowledge of such activities can hardly be disputed. Thus, on March 20, Dooley, as noted, signed the petition expressing his support for the Union, and on the very next day conspicuously wore a prounion button on his jacket for all to see. Further, as found above, Respondent's animosity towards the Union and its supporters is well documented. Indeed, aside from the fact that he openly wore a prounion button, Faure's above-described unsolicited comment to Dooley, chastising him for purportedly "lying" to her about liking his employment with Respondent, further supports a finding that Faure was fully aware of Dooley's prounion sympathies. While Respondent made no effort to explain what, if anything, caused Faure to comment as she did, the timing of her remarks, e.g., soon after observing Dooley wearing his union button,[32] and around the time she threatuened Holland with discharge for his own union activities, raises a strong suspicion that Faure's remarks were intended to convey to Dooley that Faure was aware of and did not approve of his prounion stance. Further, her comment, taken together with her subsequent "you cross that line, you live with it" remark, could reasonably have led Dooley to believe that Faure might take some unspecified action or reprisal against him for his union involvement. By her remarks, Faure not only violated Section 8(a)(1) of the Act, as alleged, but also demonstrated clearly and unequivocally Respondent's knowledge of Dooley's union activity, as well as its antiunion animus. Given these circumstances, I find that the General Counsel has made a prima facie showing under *Wright Line,* supra, that the actions taken against Dooley by Respondent, e.g., the change in driving assignment and the discharge, neither of which the Respondent denies occurred, were motivated by Dooley's union activities. I further find that the Respondent has presented no credible evidence to refute the General Counsel's prima facie case regarding either allegation.

[32] The Respondent at the hearing tried to undermine Dooley's credibility by pointing out that in his affidavit to the Board, Dooley had stated that Faure did not see him wearing his union button. However, I credit Dooley's subsequent explanation that he had no way of knowing whether Faure did or did not see the union button he wore. Given his undisputed testimony that he overtly wore the union button on his jacket, I find that Faure must have seen him wearing the union button.

As to the change in his driving assignment from long-haul to short-haul runs, except for the general denial in its answer and some questions directed at Dooley during cross-examination aimed at obtaining admissions that no reassignment had occurred or that the run had been discontinued, no evidence was presented by the Respondent to refute the documentary evidence and testimony by Dooley showing that a change in assignment with a resulting decrease in weekly wages occurred soon after the latter began wearing his prounion button. Indeed, except as noted above, the Respondent did not bother to address itself to this particular question either at the hearing or in its posthearing brief. There is, to be sure, one document that Respondent introduced into evidence which purports to show that the Carbondale run to which Dooley had been regularly assigned until sometime in late March was eliminated. The document in question, a memo from Belt to all drivers dated April 24, states that L.S.F. "will no longer be handling" several deliveries for the Coors account, including the Carbondale run. (R. Exh. 39.) It is patently clear, however, that the run was to be eliminated sometime on or about April 24, and that another company, Ivan Transport, would as of that date be performing the run to Carbondale. (See R. Exh. 41.) Thus, the memo lends support to Dooley's assertion, and refutes Respondent's contrary intimation during its cross-examination of Dooley, that the long hauls were still being made after Dooley was removed from that assignment. In fact, Dooley testified without contradiction that after he was taken off the Carbondale run, two other drivers whom he believed to be Dan Babcock and Jose Sanchez, continued to make the run.[33] Respondent's failure to provide a reason for its actions leaves the General Counsel's prima facie case intact, and warrants a finding that the Respondent changed Dooley's driving assignment from long hauls to short hauls in retaliation for his union activities, and in so doing violated Section 8(a)(3) and (1) of the Act, as alleged. *Bestway Trucking,* 310 NLRB 651, 674 (1993).

Regarding the discharge, there is no question that the reason provided for terminating Dooley, e.g., violation of company policy prohibiting drivers from carrying unauthorized passengers in company vehicles, was simply used by Respondent as a pretext to rid itself of one of several union adherents.[34] The Respondent points out that company policy at the time the incident occurred clearly prohibited drivers from carrying unauthorized "individuals" in their trucks, that written permission was needed for an individual to do so, and that Dooley was fully aware of this restriction as evidenced by his signature on a list of company rules given to him in October 1994 (G.C. Exhs. 7a–b). Given Dooley's signature on the copy of the rules, I find that Dooley was in fact put on notice regarding the existence of this particular restriction on unauthorized passengers. However, I am also convinced, given Dooley's undisputed testimony in this regard, that prior to the November 9 incident he often carried Dakota with him in his truck with Respondent's knowledge and without the latter's objection. I am in any event not convinced, despite Respondent's assertion to the contrary, that the rule in question prohibiting "individuals" from riding without authorization was applicable to pets, such as Dakota, which are not "individuals" as that term is commonly understood and used in everyday parlance. However, even if by some stretch of the imagination it could be established that Respondent's rule was intended to apply also to pets, it is patently clear that, as testified to by Dooley, Respondent had acquiesced in his practice of taking his dog along on runs without first obtaining the requisite permission.[35] More importantly, however, for purposes of showing the pretextual nature of the discharge, is the fact that despite this alleged breach of company policy, the Respondent took no immediate action against Dooley, but simply instructed him to refrain from taking his dog with him on runs, which instructions were thereafter strictly adhered to by Dooley. Nor did Respondent take any action against Dooley when the latter advised Belt on or about March 13 of the attorney's letter threatening him with legal action stemming from the November incident. Indeed, only after it became aware of Dooley's prounion stance sometime around March 21, did Respondent resurrect the "dog-bite" incident, almost 5 months after it occurred, to justify discharging Dooley.[36] The abrupt nature of Dooley's discharge on April 4, its timing, e.g., within 2 weeks of Respondent's learning of Dooley's prounion sympathies, the 5-month delay between the occurrence of the incident and the discharge, and the fact that prior to the November incident the Respondent had condoned similar conduct by Dooley, all militate in favor of a finding that the "dog-biting" incident was not the true reason for the discharge but was instead seized on by the Respondent to justify ridding itself of one of several union adherents within its midst. Where the reason advanced by an employer for a discharge

[33] Babcock and Sanchez were named by alleged discriminatee Owens as individuals who wore antiunion buttons, suggesting that they were opposed to the Union.

[34] The Respondent does not contend that it fired Dooley because of some liability it had assumed as a result of the November incident. In this regard, Dooley provided Respondent with assurances that his homeowner's insurance policy would cover any liability that might ensue, and the attorney's letter regarding this incident clearly holds Dooley liable for the incident and requests that Dooley notify his own insurance company, not the company or its liability carrier, of the attorney's request. Thus, any repercussions in terms of liability arising from this incident fell on Dooley only, and did not affect the Respondent.

[35] The Respondent introduced into evidence three authorization forms reflecting that employees Hill and Caposey had requested and been granted permission to carry family members with them during their runs (R. Exh. 7). I have no difficulty believing that drivers were indeed required to obtain permission before carrying "individuals" with them in company vehicles. However, these documents do not establish that such permission was required when pets were involved. In fact, a cursory review of the authorization form suggests that Respondent expected the passenger to read and sign the form before consent would be given, a feat which Dakota, regardless of his innate abilities or training, could hardly be expected to perform.

[36] The Respondent's suggestion in its posthearing brief (p. 10) that Dooley's "*termination occurred shortly after the Employer was put on notice*" of the attorney's claim against Dooley and "*was well prior to the Employer's notice of Mr. Dooley's*" union involvement, is contrary to the evidence of record and its own admissions. The Respondent, as noted, readily admits in its brief that Belt, contrary to his own testimony, became aware of the attorney letter sometime in March. Given that the only testimony as to a March date came from Dooley, who testified that he gave Belt notice of the letter on or about March 13, it logically follows that Respondent was referring to the March 13 date mentioned by Dooley. As Dooley was discharged on April 4, some 3 weeks after advising Belt of the letter, it can hardly be said, as argued by Respondent, that Dooley's "termination occurred shortly after" the Respondent learned of the letter. Further, as Respondent must have become aware of Dooley's involvement with the Union at about the time he began wearing his union button on March 21, his discharge on April 4, contrary to Respondent, occurred after and not before it attained such knowledge of Dooley's activities.

either did not exist or was in fact not relied on, the inference of unlawful motivation established by the General Counsel remains intact, and is indeed logically reinforced by the pretextual reason proffered by the employer. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966). Having relied on a pretextual reason for the discharge and having failed, in any event, to show that it would have discharged Dooley for violating company policy even if Dooley had not engaged in any union activity, I find that the Respondent has not satisfied its *Wright Line* burden, and therefore conclude that Dooley was unlawfully discharged for his union activities in violation of Section 8(a)(3) and (1) of the Act.

(4) William Owens

Owens began his employment with Respondent in March 1993 and worked until May 19 when, according to Respondent, he chose to quit rather than obtain a class A-CDL license. The General Counsel alleges that the Respondent unlawfully discharged Owens for his union activities and simply used Owens' lack of a class A-CDL license as a pretext to mask its true motive. The weight of the credible evidence supports the General Counsel's position.

When hired, Owens had only a class B-CDL license. Although it appears that Belt was initially in search of a driver possessing a class A license, he decided to hire Owens because of his 20 years of truck driving experience. Owens testified credibly and without contradiction that he made it clear to Belt from the very beginning that he had no desire to obtain a class A-CDL license. As a result, Owens drove only straight trucks. It appears that at least one other driver, Sadler, who was hired in June 1994, possessed only a class B license.[37] It appears that in December 1994, the Respondent issued a memo advising drivers that they would all have to obtain a class A-CDL license by January 15.[38] Owens testified that in early January, Belt met with him and Sadler. According to Owens, Belt told Sadler that as a new employee he would have to get his class A license, and assured Owens he would protect him from having to get his class A license, and further offered to give him a written statement guaranteeing he would not have to drive a tractor trailer. Owens then commented to Belt that if he had to get a class A license he might as well be looking for a new job, at which time Belt repeated that Owens' job was secure, that he would not have to drive a tractor-trailer, and reiterated he would put it in writing if Owens wanted him to. Owens declined the written assurance because he "trusted" Belt due to his long employment with him, and because most things at the Company were usually resolved with a "handshake."

Sadler corroborated Owens' above testimony regarding the January meeting. Thus, he testified that Owens told Belt he had no intentions of getting a class A license and if this meant he would lose his job, Owens would go out and get a newspaper that very night, presumably to search the want ads. Belt, however, assured Owens he was in no danger of losing his job. Sadler testified he told Belt that as the newer employee, he would make an attempt at getting his class A license. The record reflects that Sadler voluntarily terminated his employment in late March or early April without ever obtaining his class A license.

Belt admits that a meeting was held with Owens and Sadler in January, but denies telling Owens he did not have to get a class A license or assuring him he would not be terminated. Indeed, except for admitting that Owens stated he had no interest in getting a class A license, Belt provided no information whatsoever as to what, if anything, was said by himself, Owens, or Sadler at this meeting. I credit Owens' more detailed account of the meeting, which, as noted, was corroborated by Sadler. While Sadler did not specifically testify that Belt informed Owens he did not have to get his class A license, his testimony that Owens informed Belt he had no intentions of getting the class A license and would immediately go out and look for a new job if he did, and Belt's assurance that he was in no danger of losing his job, strongly suggests that Belt was indeed exempting Owens from the requirement of having to obtain a class A license.

Owens heard nothing further on the matter until May 8, when he received a memo advising him he had until May 19 to obtain the license, and that failure to do so "*will result in disciplinary action*." (R. Exh. 8.) Owens testified, without contradiction, that it would not have been possible for him to obtain his class A license by the May 19 date, given the amount of training required to learn how to drive a tractor-trailer and the procedures involved. According to Owens, "[I]f one practiced every day of the week, or every other day, you could probably learn it in 2 months." Owens' testimony in this regard is supported by Sadler who testified, also without contradiction, that it would take more than 30 days to obtain a class A license. In light of their mutually corroborative testimony, I find that Owens would not have been able to obtain his license by the May 19 deadline set forth in the May 8 memo. Owens concedes that after receiving the May 8 letter, he did not inform management of his difficulty in complying with Respondent's deadline, or seek an extension in which to do so. Nor did he remind Belt of the assurances Belt had given him in January regarding the class A license. By the same token, there is no indication that Belt or any other management official had inquired prior to May 19, whether Owens had indeed obtained his class A license.

On May 19, Owens appeared for work and, after clocking in, went to pick up his bill of lading for his daily trip, as was his practice. On not finding his paperwork in its usual location, he checked with Day, who asked him, "Do you have your Class A license?" Owens replied he did not, and Day responded, "Well, I cannot dispatch you without a class A CDL, so you will have to wait for Scott Belt." Owens then asked whether he should punch out or stay punched in and Day replied, "No, punch out and wait for Scott." A short time later, Belt arrived and Owens and Day went into Belt's office to discuss the matter. In the office, Owens asked Belt what was going on, and Belt responded, "I cannot dispatch you without a class A CDL." Owens inquired of Belt whether he was being terminated, and Belt simply repeated, "I cannot dispatch you without a class A

[37] According to R. Exh. 2, Respondent had other drivers besides Owens and Sadler who did local runs only. The record does not make clear if these other drivers did so as a matter of choice or because they too lacked class A licenses that precluded them from driving tractor trailers and limited them to short runs only on straight trucks.

[38] The December 1994 memo was not produced, and the January 15 deadline is taken from Owens' undisputed testimony. Sadler credibly and without contradiction testified that he believed employees were given 30 days within which to upgrade their licenses to class A, suggesting inferentially that the memo would have been issued on or about December 15, 1994.

CDL." Unclear as to what his status was, Owens asked Belt what he meant, and then inquired whether he should turn over his cellular phone and other equipment to Day, and Belt responded, "Yes, turn everything over to Val [Day]." Owens testified that the meeting ended on a friendly note, with him telling Belt that it had been a pleasure working for the Company, and that he enjoyed working for Faure and Belt.

The General Counsel has presented sufficient evidence to support a finding that Owens did not quit but rather was terminated, and that the discharge was motivated, at least in part, by his support for the Union. It is undisputed that when he arrived for work on May 19, the bills of lading needed for Owens to make his deliveries were not in their usual location, suggesting that Respondent had no intentions of allowing Owens to make his runs that day, a fact confirmed when Day informed him that he could not be dispatched without a class A license. Further, Day's instruction that Owens punch out and wait for Belt indicates clearly that Respondent had plans to either suspend or discharge Owens if he could not produce a class A license. Indeed, Respondent's posthearing brief makes clear that Respondent intended to "discipline" Owens for insubordination for failing to obtain his class A license. (See R. Br. 23.) Although Respondent does not specify what discipline it would have imposed, the removal of the bills of lading from its usual location, and the fact that he was not allowed to clock in, strongly suggests that the discipline intended was either a suspension or termination. Further, although he repeatedly requested Belt to advise him of his status on May 19, Belt declined to do so and left it up to Owens to further inquire what he should with his equipment. Belt's instruction to him that he should turn everything over to Day provides clear evidence that Respondent was in fact terminating him, presumably for not having his class license.[39] Owens, as noted, was a union supporter. Thus, he signed the union petition on March 21, and credibly testified that he attended union meetings. That same day, although it is unclear from the record whether it was before or after Owens signed the petition,[40] Belt unlawfully sought to ascertain from him whether a union petition was being circulated among the drivers, threatened him with plant closure and loss of jobs, and informed him in no uncertain terms that he viewed such organizational efforts as a personal affront to him. Nor was this the only instance of unlawful behavior by Respondent towards Owens for, as noted, the day before the election Owens was again unlawfully questioned by Burnson regarding his union sympathies, more particularly, how he intended to vote in the election. Owens' reply that if he voted with his head he would vote for the Union, conveyed the message that for Owens the logical choice was to throw his support behind the Union. On election day, according to Owens' undisputed testimony, he observed certain employees who were opposed to the Union wearing "Vote No" buttons. Although a union supporter, Owens wore neither a prounion or antiunion button. While there is no direct evidence to link Respondent to knowledge of Owens' union activities, the fact that he was interrogated and threatened by Belt on the day he signed the petition strongly suggests that Respondent either knew or suspected that Owens was somehow involved in union activity. Further, Owens' response to Burnson's unlawful interrogation, intimating that the logical choice for him would be to vote for the Union, along with the fact that the following day Owens, unlike other employees, did not wear a "Vote No" button, behavior which could not have escaped Respondent's notice given the relatively small number of employees involved in the election, provides a reasonable basis for inferring, as I do here, that Respondent either knew or suspected, by no later than April 29, that Owens was indeed a union supporter.[41] This knowledge, together with Respondent's clear animosity towards the Union and its supporters, the timing of the discharge just 3 weeks after it became aware of his sympathies, and the circumstances surrounding the discharge, described below, provides ample basis for inferring that Owens' discharge was motivated by antiunion considerations. Accordingly, the General Counsel has made out a prima facie case regarding Owens' discharge.

The Respondent's sole defense is that Owens failed to obtain a class A license despite being given ample warning and sufficient time in which to do so. Thus, it points to the fact that Owens and other employees were put on notice as far back as December 1994 that they were required to have a class A license by January 15, and Owens was again reminded in the May 8 memo of the need to obtain the license. While no one disputes that a December memo was issued, Owens' credited testimony, as corroborated by Sadler, makes clear that sometime in January, Belt effectively exempted Owens from this requirement and further reassured him he was in no danger of losing his job for failing to obtain a class A license. Indeed, it does not appear that this particular issue was one of great con-

[39] Hoping to bolster Belt's rather feeble and scant testimony as to what occurred at the May 19 meeting, the Respondent produced an unsigned May 30 memo, which Belt claims was a "synopsis of what happened in the meeting" between Day, Owens, and himself. Belt stated that he dictated and his secretary typed the memo. (R. Exh. 10.) I place no credence in the letter. While allowed into evidence, the letter apparently was intended by Respondent to serve as a substitute for oral testimony, which the Respondent, for reasons unknown, failed to elicit from either Belt or Day, both of whom testified at the hearing. Although identified by Belt as something he dictated, no testimony was adduced by Respondent from Belt or Day as to the accuracy of its content. Indeed, when compared to Owens' testimony, which I credit, it does appear that the memo contains certain inaccuracies. For example, the memo states that Day instructed Owens not to clock out until he spoke with Belt, which is contrary to Owens' claim that Day indeed directed him to clock out before he spoke with Belt. As Belt was not present during the premeeting discussion between Day and Owens, he could not have known what was said between the two. Day was not asked to confirm the accuracy of the memo in this regard. Further, Owens credibly denied telling Belt, "I am not going to drive a big truck, I don't want to," contrary to what is contained in the memo. Again neither Belt nor Day refuted Owens' denial in this regard, and the Respondent's attempt to do so through R. Exh. 10, an unsigned document prepared more than one week after the occurrence, without so much as attempting to elicit corroborating oral testimony from Day or even Belt himself, renders the document unreliable and not worthy of belief. Further, R. Exh. 11, which Belt identified as Owens' resignation notice, is found to be a self-serving document entitled to no weight. Owens credibly testified he never saw the document prior to the hearing, and no testimony was adduced from either Belt or Day that this document had indeed been shown to Owens. Accordingly, I am convinced R. Exh 11 was prepared after the fact in order to bolster Respondent's assertion that Owens' voluntarily quit his employ, and was not fired.

[40] Employee Hill, who solicited Owens signature on the petition, testified that Owens signed the petition in a McDonald's parking lot on March 21. Owens did not state whether the signing occurred before or after his 11:30 p.m. encounter with Belt that same day.

[41] I note in any event that the Respondent does not deny having knowledge of Owen's union activities.

cern to Respondent for despite its December memo and January 15 deadline, the Respondent did not bring up the matter of class A licenses until almost 4 months after the January 15 deadline had passed, and coincidentally some 3 weeks after learning of Owens' involvement with the Union. When it did raise the issue again, it gave Owens a little more than 1 week in which to obtain his license or face disciplinary action, a feat which Owens could not possibly achieve in such a limited time frame. Belt offered no explanation as to why, after exempted Owens from having to upgrade his license, he had a sudden change of mind some 4 months later, nor did he explain the urgency behind his insistence in the May 8 memo that Owens acquire the license within 10 days or face discipline. While Respondent may very well argue that Belt provided Owens with no such exemption, I have, as noted, rejected such a claim. Nor was Owens the only class B driver who continued driving without a class A license despite the January 15, deadline. Thus, Sadler who, for unexplained reasons, voluntarily quit his employ in late March or early April, never obtained a class A license. Nothing in his or indeed Belt's testimony suggests that during the period after the January meeting and his departure, Sadler was similarly instructed by Respondent to obtain his class A license or face discipline. Nor did Respondent produce evidence to show whether other drivers who possessed only class B licenses received similar memos warning of disciplinary action if they did not obtain a class A license by a date certain. Given these facts, I am convinced that but for his union activities, Owens would not have been asked to obtain his class A license and would have been allowed to continue performing his normal driving duties for Respondent with a class B license, as he had been doing since first hired 2 years earlier. Accordingly, the Respondent has not sustained its *Wright Line* burden and a finding is warranted that Respondent's discharge of Owens violated Section 8(a)(3) and (1) of the Act.

(5) Walter Michaels

Michaels, Respondent's most senior driver, worked for Respondent from September 1992 until May 15, 1995. Michaels testified that from the very beginning of his employment he made it clear to management that he was interested only in doing local runs and that this was common knowledge among the dispatchers, including Day. According to Michaels, in late 1994, shortly after Respondent picked up the Coors account, he was asked to do long-haul runs because of a shortage of drivers. He further testified, without contradiction, that both Day and Belt assured him that once Respondent hired sufficient drivers, he would be assigned primarily to local runs. The record supports Michaels' above assertion. Thus, except for the brief period after the Respondent acquired the Coors account in late 1994, Michaels was assigned almost exclusively to local runs. Respondent's Exhibit 13, consisting of Michaels' "Driver's Daily Log," reflects that the last long-haul run performed by Michaels prior to his return from medical leave on May 15, occurred some 5 months earlier on January 31.[42]

Michaels, as noted, attended the March 20 union meeting and signed the petition that same evening. Further, the morning after the union meeting Michaels, as found above, was subjected to unlawful interrogation by Day and was led to believe that his activities and that of other employees were under surveillance. On March 27, Michaels was dispatched to a local run at about 7 a.m., and returned later that afternoon at about 3 or 4 p.m. After checking in with the dispatcher, Day, he was told he was through for the day and to clock out and go home. Later that evening, Day called Michaels at home to ask if he would take a long-haul run to Detroit that same night. Michaels informed Day that he was not interested in making the run as he had worked all day and probably would not have sufficient DOT hours to make the run. Day told Michaels that she would try to find someone else to take the Detroit run. However, not long after hanging up, Day called back and again asked Michaels to make the Detroit run and when Michaels refused, told him that Belt wanted to talk to him. Belt reiterated Day's request and when Michaels again refused, Belt informed him he was being suspended for 2 days. Michaels protested that Belt was being unfair but Belt declined to discuss it further. Michaels then drove to Respondent's office in an effort to discuss the suspension with Belt, but the latter declined to meet with him.

During his 2-day suspension, Michaels went on medical leave to undergo surgery for an inguinal hernia, which was performed on April 5. On May 9, Michaels was medically released by his physician to return to regular work duties, and he thereafter reported for work on May 15. Michaels claims that on the evening of May 15, he was dispatched to make a long haul run to Frank's Nursery in Detroit, and that he performed the run despite protesting to both Day and Belt that he was a local driver and had no interest in doing the Detroit run. He further testified that the following day, May 16, after completing the Detroit run, he was dispatched to Indianapolis, which was another long-haul run, and that either on May 17 or 18, he was dispatched yet again to an over-the-road run to Des Moines, Iowa. Michaels testified, without contradiction, that he again expressed his dissatisfaction about making the long-haul runs to Day. On completion of the Des Moines run, Michaels was instructed to pick up a backhaul load from Cedar Rapids, Iowa, and to deliver it directly to Chicago that same evening. Although he agreed to make the backhaul delivery, Michaels testified that after thinking it over he concluded that things were not "going to get any better" for him and that after phoning and discussing the matter with his wife, he decided to quit. He thereafter called Respondent's office and informed Day that he was quitting and would be returning the backhaul load to Respondent's yard instead of delivering it to Chicago. Day thereafter put Belt on the phone at which time Michaels told Belt that his "body just couldn't physically handle driving the amount of hours" he had been driving recently, and that he was quitting because "it was best for everybody concerned because [he] didn't want to hurt nobody getting into an accident or anything."

The General Counsel contends, and I agree, that Michaels' 2-day suspension was unlawfully motivated by antiunion considerations. Day's interrogation of Michaels the morning following the union meeting as to how the meeting had gone strongly suggests that Respondent either knew or strongly suspected that Michaels had attended the meeting and was a union supporter. Further, Michaels' "none of your business" response to Burnson's unlawful repeated inquiry as to how he intended to vote in the Board election, when viewed in light of Day's comment

[42] The Respondent produced no evidence to show what, if any, long-haul runs Michaels may have been assigned between January 31, and May 15. The only other long-haul assignment relating to Michaels during this period occurred on March 27, when the latter declined to take the Detroit run which, as found infra, led to an unlawful 2-day suspension.

suggesting that Respondent was keeping union activities under surveillance and knew of Michael's involvement there, would clearly have given Respondent cause to believe that Michaels intended to vote for the Union. Given Respondent's knowledge of Michaels' prounion sympathies and its established antiunion animus, the General Counsel has made out a prima facie case under *Wright Line* that the 2-day suspension handed to Michaels for refusing to make the Detroit long-haul run was retaliatory in nature and in response to his support for the Union.

The Respondent has failed to rebut the General Counsel's prima facie showing regarding Michaels' suspension. It should be noted that Respondent in its answer initially denied having handed Michaels a 2-day suspension. However, when faced with Michaels' undisputed testimony and documentary evidence of record showing such a suspension, the Respondent conceded the suspension, but asserted that the suspension was valid because Michaels "understood that if a driver refuses a run that that driver is subject to disciplinary action." (R. Br. 14.) However, Michaels credibly and without contradiction testified that he had in the past refused to take such additional runs without repercussions. The Respondent in this regard produced no evidence to show that Michaels or any other driver had previously been disciplined for refusing such additional runs. Thus, assuming arguendo that drivers could have been subject to discipline for refusing to take a run, the Respondent failed to establish that such a policy, if it existed, had been applied in the past. Further, it should be noted that this was not a case in which Michaels refused to perform his regularly assigned duties. Rather, Michaels was being asked to make an additional run after having completed a full day's work, and was asked to do so almost immediately on returning home from work. Given that Michaels had made it clear to Respondent that he had no interest in doing long-haul runs, that the Respondent had always honored his request by assigning him to local runs only, that Michaels had previously declined such long-haul runs without repercussions, and that Respondent did not establish that such assignment could not have been given to some other driver, I find that the Respondent deliberately set up this situation knowing full well, or at a minimum suspecting, that Michaels would not accept the assignment, thereby affording it an opportunity to further retaliate against Michaels for his involvement with the Union. In these circumstances, I find that the Respondent has not demonstrated that it would have suspended Michaels for 2 days for refusing to take the assignment had he not engaged in union activities. Accordingly, his suspension is found to have violated Section 8(a)(3) and (1) of the Act.

The General Counsel further alleges that Respondent constructively discharged Michaels, by assigning him upon his return from medical leave to long-haul runs exclusively causing him to resign on May 18. I find merit in the General Counsel's contention. To support a finding of constructive discharge, the General Counsel must establish that the burdens imposed on the employee caused, or was intended to cause, a change in working conditions so difficult or unpleasant as to force the employee to resign. *Manufacturing Services*, 295 NLRB 254, 255 (1989). Here, there is no question, and the Respondent does not contend otherwise, that the long-haul runs were more difficult and for the most part more unpleasant in comparison to the local runs. These long-haul runs more often than not required drivers to drive long distances and to spend nights away from home sleeping in small compartments in their tractor-trailers. Compare, *Bestway Trucking, Inc.,* supra at 674–675. Michaels credibly testified that this was precisely why he had no interest in the long-haul runs and why he had requested only local run assignments, a request that Respondent had no difficulty honoring until after it became aware of Michaels' prounion position. Thus, when the Respondent assigned Michaels to a long-haul run to Detroit on his return from medical leave, which incidentally was the same run Michaels had declined to do on March 27 and which led to his unlawful suspension, it must have known that Michaels would find such an assignment objectionable. Predictably, Michaels did object to both Day and Belt about his assignment, although he proceeded to make the run. To compound Michaels' aggravation regarding this assignment, the Respondent went one step further and assigned him to long-haul runs for the next 2 days, which it had not done since the Coors account was first acquired in late 1994. The Respondent gave no explanation for having assigned Michaels to these particular long runs, or for insisting that he deliver a backhaul directly to its destination contrary to existing practice, or why it did not assign Michaels to his regular local runs. Nor does it claim that there was a shortage of long-haul drivers, which necessitated the assignment to Michaels of the long runs.[43] While there is no question that Michaels quit his employ, Michaels' testimony makes clear that his resignation was a direct result of the Respondent's conduct in assigning him to the more difficult, unpleasant, and in Michaels' mind undesireable, task of driving long-haul runs. I am convinced that the Respondent must have known or at least suspected, given his employment history with the Company and his refusal to accept the March 27, long-haul assignment which led to the unlawful suspension, that Michaels' resignation was a distinct possibility if it continued to assign him to long runs. In any event, whether or not Respondent actually intended Michaels to quit is immaterial, for it is readily apparent to me, and I find, that Respondent should reasonably have foreseen that the continued assignment of long-haul runs to Michaels would eventually cause Michaels to quit his employ. *La Favorita, Inc.,* 306 NLRB 203, 205 (1992). For these reasons, I find that the Respondent constructively discharged Michaels on May 15, because of his union activity and that its conduct in this regard violated Section 8(a)(3) and (1) of the Act, as alleged.

(6) John Kawa

Kawa began his employment with Respondent in September 1994 as an over-the-road or long-haul driver. He testified without contradiction that when hired, then-Operations Manager Terry Trojak, assured him that for the most part he would be primarily responsible for handling the Frank's Nursery runs to and from various locations. Sometime during a safety meeting conducted in January, Belt, according to Kawa's undisputed testimony, assured him that because of the fine job he had been doing with the Frank's account, Kawa would never be taken off the run. Belt's comment in this regard was designed to allay fears expressed by Kawa to Belt that because other drivers had occasionally been assigned to the Frank's run Kawa might be in danger of losing the run to other employees. Kawa thereafter, until about March 22, continued to be assigned the Frank's runs

[43] The Respondent's erroneously suggests that Michaels' testimony reflects that he was aware that a number of drivers were unavailable for work. Michaels' testimony in this regard is that he did not know whether or not certain drivers were available for work.

almost exclusively, although on few occasions he was asked to make a Coors run as well as some local runs.

Kawa, as noted, signed the union petition on March 21. A day or so prior to signing, Kawa, as found above, was unlawfully interrogated by Day regarding his views on the Union. While Kawa was not a known union activist, he left no doubt in Day's mind as to his prounion sympathies when in response to her inquiry, he told Day that he felt having a union would be a good thing for him, and that he would probably join the other employees in voting for the Union if it was ever to come in. Beginning around March 22, Day reassigned Kawa to a different route. When Kawa inquired why he had not been assigned to do the Frank's run on March 22, Day informed him that the other drivers had complained to her that Kawa was making too much money on the run and that she had therefore decided to take him off the run. Kawa thereafter saw a sharp reduction in the number of Frank's runs assigned to him, and claims that as a result he experienced an almost 50-percent reduction in his weekly take-home pay. On or about April 8, Kawa spoke to Faure and Crohan about the reduction in the number of Frank's assignments he had been receiving. Neither Faure nor Crohan, however, was able to provide Kawa with an explanation, and when Kawa stated he believed it was somehow related to the Union, Faure responded that it had nothing to do with the Union but declined to provide him with some other explanation.

On April 30, Kawa was assigned to make a Frank's delivery to a Detroit location by 6 a.m. the following day, May 1. Kawa testified that on April 30, he worked on his boat from about 10 a.m. to 2:30 p.m., and drank some four to five beers during that period. Kawa thereafter reported for work at 11 p.m. that day, and began the run at midnight. While en route, Kawa was stopped around 3 a.m. by a Michigan State policeman and cited for speeding, e.g., going 69 miles per hour in a 55-mile per hour zone. (G.C. Exh. 22.) The policeman thereafter confiscated Kawa's license, which was to serve as a cash bond to ensure that the fine imposed would be paid. Noticing some alcohol on his breath, the policeman gave Kawa a breathalyzer test which registered .009 percent. Kawa then received another citation reflecting the results of the breathalyzer test, but was assured by the policeman that he was not being cited for a "Driving under the Influence" (DUI) violation, and that this particular writeup would not be reflected on his driving record, a fact which Kawa later confirmed through a review of his driving record.

At about 7 a.m. on May 1, Kawa phoned Day to tell her about the above incident and to notify her he had not arrived at his Detroit destination. When he got to Detroit, he again called Day wherein she instructed him to return to Respondent's facility because Belt wanted to see him. When he arrived at Respondent's facility, he met with Belt and, after recounting what had happened, Belt, according to Kawa's uncontroverted testimony, stated: "Well, John, I have no alternative except to suspend you from this time on, pending your getting your license back." Kawa further testified, without contradiction, that the following day, he returned to the Company's facility to turn in certain items (radio, credit cards, phone cards, etc.) and that during another discussion with Belt the latter told him that "[a]s soon as you get your license back, give me a call, and you will probably go back to work." A record of his suspension was prepared on May 2, containing a notation that Kawa had been placed on indefinite suspension pending further investigation (R. Exh. 43). On May 18, Kawa got his license back and immediately phoned Respondent and spoke with Helton, who seemed pleased that Kawa was able to get his license, and who thereafter told Kawa "you will probably come back to work." Helton, who testified in this matter, did not dispute Kawa's above assertion. Helton thereafter transferred Kawa's call to Belt, who told Kawa that Respondent's attorney, Walter Liszka, wanted to speak with him. On May 23, Kawa met with Belt, Helton, and Liszka. At this meeting, Liszka informed Kawa that he had two options: either quit or be fired. Although Kawa explained that the only thing on his driving record was a speeding ticket, and that he had not been charged with a DUI violation, Liszka remained firm that Respondent did not want him working there any longer. Kawa thereafter shook hands with Belt and Helton and left.

The complaint alleges and the General Counsel contends that Kawa, like Dooley, was removed from his regularly assigned routes because he supported the Union. The credible evidence of record establishes that on or about March 22, the Respondent reduced the number of Frank's runs that had been regularly assigned to him, and that such change was motivated by antiunion considerations. Thus, there is no question that Kawa was a union supporter and that Respondent was aware of this fact, for after signing the union petition he stated to Day that he favored and would lend his support to the Union. Further, as found above, there is an abundance of evidence demonstrating Respondent's antiunion animus. These facts, coupled with the fact that the assignment change occurred just 1 day after Kawa signed the petition and after informing Day of his prounion position, supports the inference that the change in Kawa's driving assignment on or about March 22, which Respondent does not dispute occurred, was motivated, at least in part, by Kawa's prounion stance. The Respondent made no effort to rebut the General Counsel's prima facie showing in this regard. In fact, the Respondent in its posthearing brief argues only that Kawa's earnings during the period in question remained high, possibly exceeding that of other drivers, and that the earnings belie any claim that the admitted change in Kawa's driving assignments may have been motivated by antiunion considerations. However, the fact that Kawa's weekly earnings during the period after March 22 may have exceeded that of other drivers does not alter the fact that Respondent indeed reduced the number of Frank's runs that were routinely assigned to Kawa, and that it did so in retaliation for his support of the Union.[44] Clearly, the

[44] The record is unclear as to whether Kawa experienced a 50-percent reduction in his weekly earnings as a result of the reduction in the number of Frank's runs he was asked to do after March 22, as claimed by him. R. Exh. 2 reflects that for the pay period ending "3–17–95" which precedes the March 22, assignment change, Kawa's earnings totaled $656.33. However, his earnings for the pay period immediately preceding March 22, e.g., "3–23–95," were slightly higher and totaled $839.28. The "3–30–95" pay period, which presumably includes work performed during the period after the assignment change, reflects that Kawa earned $734. 33, an amount that, while somewhat lower than the prior pay period's earnings, is nevertheless higher than his earnings for the "3–17–95" pay period. R. Exh. 2 further shows that for the period ending "4–6–95" Kawa was assigned to do local driving as well as long-haul runs, and that his combined earnings from local and long-haul runs totaled $902.25. Although it is difficult to ascertain what, if any, effect the change in assignment may have had on Kawa's weekly earnings, R. Exh 2 casts doubt on Kawa's claim that he experienced a 50-percent reduction in weekly take-home pay as a result of the reduction in the number of Frank's runs assigned to him after March 22. To the extent he suffered a loss as a result of this change, this

Respondent knew full well that Kawa preferred doing the Frank's runs and, consequently, had him assigned to such runs almost exclusively from the very outset of his employment. Further, it reassured him in January that he would never be removed from such runs. Given these facts, I find that the Respondent has not refuted the General Counsel's prima facie case, and accordingly further find that the Respondent violated Section 8(a)(3) and (1) of the Act when it retaliated against Kawa for his union activity by reducing the number of Frank's runs it assigned to him after March 22.

The issue of whether Kawa was thereafter terminated because of his union activities presents a closer question. The General Counsel asserts that the change in Kawa's work assignment was merely part and parcel of an attempt by Respondent to force Kawa to resign, and that when Kawa refused to do so, it jumped on the opportunity afforded it by Kawa's May 1, incident to finally rid itself of one more union adherent. Thus, while not disputing that Kawa was cited on May 1, she avers that these citations were merely used as a pretext to get rid of Kawa. For the reasons stated above regarding Kawa's reassignment of work, I find that the General Counsel has made a prima facie showing sufficient to support the inference that Kawa's involvement with the Union was a motivating factor in Respondent's decision to terminate him. Having made out a prima facie case, the burden shifts to the Respondent to show by a preponderance of the credible evidence that Kawa would have been discharged for the May 1 incident even if he had not engaged in any union activity. I am convinced that the Respondent has not sustained its burden in this regard.

Although both Belt and Helton generally testified that Kawa was discharged on May 23, because of the citations Kawa received on May 1, they offered no specifics as to what was said or who spoke during this particular meeting. Indeed, they did not agree on who was present at this meeting, for while Helton agreed with Kawa that attorney Liszka was present, Belt made no mention of Liszka being at the meeting and testified that the meeting was attended only by himself, Helton, and Kawa. Given Liszka's clear and apparently extensive involvement in Kawa's discharge interview (Tr. 533, 555), I find it difficult to believe that Belt simply forgot to mention that Liszka was also in attendance at the meeting. Rather, his less than credible performance as a witness convinces me that Belt intentionally chose not to reveal that Liszka was in some manner involved in Kawa's discharge. Further, his limited testimony as to the underlying reasons for Kawa's discharge is vague and not very convincing. Belt, for example, explained that Kawa was discharged because "he had his license suspended, number one; and number two, he was given a breathalyzer and it was undetermined at that point what his reading was from the breathalyzer test, which we had no supporting documents at that point." Belt's latter assertion is somewhat confusing for it suggests that Respondent did not have documentary evidence prior to the discharge showing the results of the breathalyzer test given to Kawa on May 1, by the Michigan State police. If this is what Belt intended by his above statement, then Respondent's argument that Kawa was lawfully discharged for a DUI violation is seriously undermined for it would mean that the Respondent's decision to terminate Kawa was made without evidence of such a violation. However, Belt's comment could be construed as suggesting that such documentation was not immediately available to him on or about May 1, suggesting the likelihood that this might be why Kawa was not instantly terminated on his return from the Detroit run, but was instead suspended indefinitely pending "further investigation," as noted in Respondent's Exhibit 43, the suspension notice. While this latter explanation for Belt's testimony is the more plausible of the two, it too is rendered specious by Belt's subsequent admission that when Kawa returned from Detroit, he provided Belt with copies of the citations received, including the document showing that Kawa had registered .009 percent on the breathalyzer test (G.C. Exh. 23). As Belt was not asked to explain what he meant by his above statement and made no effort to clarify his statement in this regard, Belt's confusing testimony as to why Kawa was discharged is given no weight whatsoever. Nor do I find persuasive Helton's testimony regarding the reason for Kawa's discharge. Thus, Helton stated in very general terms that Kawa was discharged on May 23, for the citations received on May 1. Helton did explain that drivers found to have alcohol in their system were subject to immediate dismissal. However, if this is so, Helton offered no explanation as to why in Kawa's case Respondent waited more than 3 weeks to discharge him. Helton also provided no testimony as to what transpired at the May 23 discharge meeting, nor did he explain why Kawa was suddenly discharged just 5 days after he told Kawa he would probably be returning to work. I found Helton's testimony regarding Kawa's discharge unconvincing and not credible.

The inquiry does not end here, however, for there is no doubt that Kawa was indeed cited for speeding and for having a "detectable amount of alcohol" in his system, and Kawa concedes being told on May 23, by Attorney Liszka, that because of the citations received, Kawa had the choice of quitting or being terminated. Thus, the question remaining is whether Kawa would have been terminated for the May 1 driving incident had he not been engaged in union activity. Several factors convince me that he would not have been discharged. The Respondent, for example, did not explain why it waited more than 3 weeks to discharge him despite the fact that Kawa gave Belt copies of the citations the same day the incident occurred. Clearly, it had all the evidence necessary to make its decision by May 1 or 2, and if, as Respondent suggests, Kawa committed a dischargable offense by breaching its rule prohibiting the consumption of alcohol by a driver "prior and or during working hours (see G.C. Exh. 7[a]," why was he not immediately discharged as purportedly required by its rules?[45] The clear answer is that except for the suspension, Respondent had no intentions of further disciplining Kawa for the May 1 incident. Thus, Belt on two separate occasions assured Kawa that as soon as he got his license back, he would in all likelihood be returned to work. Indeed, as of May 18, when he was finally able to obtain his license, Kawa was again reassured by Helton that Belt would

would be a matter that can best be determined at the compliance stage of the proceeding.

[45] G.C. Exh. 7[a], which is a list of driver rules, provides, inter alia, that "[a]bsolutely no alcoholic beverages are permitted prior and or during working hours. Consumption and or possession of alcohl [sic] while on duty will result in immediate dismissal." Helton testified that he understood this particular rule to mean that "any alcohol in a driver makes him subject to immediate dismissal." Assuming this is an accurate interpretation of the rule, Helton offered no explanation as to why Kawa was not "immediately dismissed" on Respondent's receipt of the citation which, according to Belt, was given to him by Kawa on or about May 1.

probably put him to work again. Despite these assurances, the Respondent terminated Kawa on May 23, using the citations issued to Kawa on May 1, as the basis for the discharge. The Respondent, however, provided no explanation as to what, if anything, occurred between May 1 and 23 to cause it to change its mind and to convert the suspension into a discharge. In this regard, the Respondent made no claim either at the hearing or in its posthearing brief that it delayed discharging Kawa pending further review of the incident.[46] The Respondent further does not contend, nor indeed is there is any evidence to suggest, that the discharge decision resulted from the enforcement of some progressive disciplinary policy whereby Kawa's prior misconduct was taken into consideration in determining whether or not to discharge him. In this regard, Kawa credibly testified, without contradiction by Respondent, that he had never received any disciplinary writeup or warning prior to the May 2 suspension.[47]

The only intervening event between May 1, when the incident occurred, and May 23, when the discharge occurred is the involvement by the Respondent's legal counsel in the matter. While the record is silent as to what input Liszka may have had regarding the discharge decision, it is patently clear that prior to his involvement Belt had every intention of allowing Kawa to return to work on receipt of his license. Whatever may have transpired between Respondent and its legal counsel, I am firmly convinced that the May 1 incident was not the true reason for the discharge and that Respondent, more likely than not upon the advice of counsel, opportunistically seized on the May 1 incident as a way of ridding itself of one more union adherent. When a respondent's stated motives for its actions are found to be false or pretextual, it may be reasonable to infer from all the circumstances that the true motive for the action taken is an unlawful one which the respondent desires to conceal. *Flour Daniel, Inc.,* 304 NLRB 970 (1991). Given all the circumstances surrounding Kawa's discharge, I find that Respondent discharged Kawa because of his support for the Union rather than for the citations received by him on May 1. Further, even if the citations were seriously considered by Respondent, I am convinced that Kawa would have been retained by Respondent had he not been supportive of the Union. Accordingly, I find, as alleged in the complaint, that Kawa's discharge violated Section 8(a)(3) and (1) of the Act.

[46] The only evidence in this regard is found R. Exh. 43, which, as noted, contains the notation that Kawa was under suspension "until further investigation." The Respondent, however, did not explain or provide evidence to show what, if any, investigation it conducted into Kawa's May 1 incident. Nor did it explain why, if there was a likelihood Kawa could be discharged, Belt assured Kawa he would probably be returning to work once he regained his license.

[47] During examination by the General Counsel, Belt claimed that Kawa had once been reprimanded for failing to make a delivery because he had overslept, and that the reprimand was documented in Kawa's personnel file. However, when handed Kawa's file and asked to produce the document in question, Belt was unable to do so, and was forced to concede that he never mentioned to Kawa that he was receiving a disciplinary notice. Belt's testimony in this regard, along with his failure to identify Liszka as a participant in the May 23 discharge meeting with Kawa, when viewed together with other above-described inconsistencies in his testimony renders suspect his entire testimony relating to Kawa's discharge.

(7) Dennis Hill

Hill was first employed by Respondent in May 1993 as a truckdriver and, according to his uncontroverted testimony, for a period of about 6 months prior to March 23, 1995, 90 percent of his assignments involved long-haul runs. In March 1994, while making a delivery, Hill experienced a "seizure" which caused him to interrupt his run. After being examined by paramedics, Hill was admitted to a local hospital where he remained for 2 days undergoing tests. Shortly thereafter, on or about March 14, Hill's neurologist, Dr. Cristea, authorized him to return to work. On returning to work, Hill was advised by then-Operations Manager Trojak that he had to undergo another physical before being allowed to drive as required by DOT regulations. Hill agreed to undergo the physical examination, which he underwent at the Hammond Clinic on or about April 7. The examination found Hill to be in "good general health" and, consequently, Hill was allowed to continue driving. The record reflects that such DOT medical certifications are valid for a 2-year period. The evidence reflects that certain of the medical bills incurred by Hill associated with his hospital stay were paid by Respondent, and that the latter thereafter began to recoup the expenses by making deductions from Hill's paycheck.[48]

Hill, as noted, was one of the more active union adherents who not only signed the union petition but also circulated the petition to other employees for their signatures. Further, Hill openly declared himself a union activist when he joined Holland in delivering the "Open Letter to Management" to Belt, by wearing a union pin identifying him as prounion, and serving as the Union's observer at the Board-conducted election. As found above, Hill became the target of Respondent's efforts to learn of the Union's organizational efforts before it even learned of Hill's involvement when, on the morning of March 21, Day unlawfully interrogated him about employees "trying to go union." Hill testified, without contradiction, that beginning on March 23, he noticed a change in his work assignments from primarily long hauls to shorter runs. Thus, he claims that whereas prior to March 23, he averaged approximately 2000 miles per week, after March 23, his weekly mileage was somewhere between 1300 and 1400, and that this drop in mileage adversely affected his weekly earnings because he was no longer "making as much as I used to."

Hill testified that on or about March 22 or 23, Belt called him into his office and asked him to sign a document acknowledging that Respondent had advanced him moneys for the payment of personal debts, e.g., the medical bills, that the debt remained due and owing to Respondent, and that Hill would agree to pay off this debt by having payments automatically deducted from his paycheck. The document further provided that in the event Hill's employment was terminated, he would agree to pay Respondent $200 per month until the total debt (which was $2315.63 as of March 22), was paid in full. Hill declined to sign the document, stating to Belt that he had never borrowed money from Respondent, and that Faure had reneged on an earlier promise to pay his medical bills. Belt did not pursue the matter and Hill left without signing. Later that same day, Faure asked Hill why he had declined to sign the indemni-

[48] Hill claims that he inquired of Helton why the deductions were being made from his paycheck, and that Helton explained that Respondent decided to deduct what it had paid out on Hill's behalf because it had not anticipated the medical bills being so high.

fication letter, and Hill responded that Faure had reneged on her promise to pay his medical bills and that while he had not previously objected to Respondent deducting certain amounts from his paycheck, he was not willing to sign a document that would bind him to pay the Company for moneys he did not owe in the event he lost his job. While the conversation with Faure ended at that point, Hill testified, without contradiction, that some 20 minutes later he was in Belt's office along with Faure, when Faure remarked, "You see, you cut me and I bleed," and that he responded to Faure, "So do I." Hill further testified that at that point, Belt asked him if it was all right for him to comment on the union pin Hill was wearing, but that Faure instructed Belt not to do so.

On April 4, after making his delivery, Hill called the office and spoke with Day who asked him what he had done with the previous day's bills of lading. Hill informed Day that he had forgotten to turn them in and were still in the truck with him. Day then instructed him to turn them in when he returned and Hill agreed to do so. That same evening, on his return to Respondent's facility, Hill turned in the bills he had earlier discussed with Day. However, on the payday following April 4, which Hill recalls was a Friday, Hill received a written disciplinary warning issued to him by Belt for having failed to turn in his April 3 paperwork on time. (G.C. Exh. 17.) Hill testified, without contradiction, that he had in the past turned in his paperwork late but was never disciplined for it, and could not recall any other employee ever being disciplined for such conduct. Hill claims he did not discuss the matter with anyone in management because he did not believe anything could be done.

On April 12, Hill made an assigned run and after arriving at his destination phoned Day, who informed him that she was assigning him to a short run the following day because he had to take another physical examination. After completing his run the next day, Hill called Day, who instructed Hill to hurry back to Respondent's facility because she needed the trailer. Hill did as instructed and hurried back. On his arrival, Day informed Hill that Belt wanted to speak with him. Hill thereafter met with Belt in his office at which time, according to Hill, Belt told him that he had to undergo another physical examination due to insurance requirements (see R. Exh. 46), and handed him a letter Belt had received from Dr. Feldman, a DOT physician at the Hammond Clinic, stating that due to existing medical conditions two drivers who were not named in the letter should not be allowed to drive until released to return to work after a complete evaluation (R. Exh. 18). Following this discussion with Belt, Hill asked if he would still have a job after his physical, and Belt responded that he would. Later that same day, Hill contacted his neurologist, Dr. Cristea, explained the situation to him, and asked him to fax the necessary documentation on his medical status to Dr. Feldman. Not having heard from Dr. Feldman, Hill phoned Dr. Cristea to inquire if the paperwork he had requested had been sent to Dr. Feldman. On receiving assurances that it had been sent, Hill called Dr. Feldman's office and spoke to a woman, identified only as "Kelly," who told him that Dr. Feldman had received certain information on him but she was not sure if it had been looked at by Feldman. Hill asserts that he had several conversations with Kelly regarding this matter. On or about April 13, Hill received a call from Belt who asked him if he had heard anything yet from the doctors, and Hill responded he had not. Belt thereafter, as found above, unlawfully questioned Hill on how he would vote in the election, and when Hill declined to comment, Belt made his remark about the how he could not have a truck just "sitting there."

Hill testified that he considered himself as having been terminated following receipt of a letter from Respondent dated August 7, informing him that the medical benefits granted him under the Family Medical Leave Act were set to expire on August 14, and that if he wished to continue receiving medical benefits coverage he should fill out and return the required COBRA forms. The letter further advised that if he wished to return to work as a driver for Respondent, he was to report for work on August 28, possessing a current certified DOT license, and if he failed to do so, he would be presumed to have resigned his position (R. Exh. 22). Hill testified that he was unable to obtain the required DOT medical certification within the timeframe allotted in the letter, but did not notify Respondent of this fact. He subsequently obtained the medical certification on or about September 22 (see G.C. Exh. 18), and went to work for another company because he "wouldn't work for [Respondent] again."

The complaint alleges, and the General Counsel contends, that the Respondent changed Hill's driving assignments on or about March 22, issued him a written warning on April 4, and thereafter placed him on medical leave on or about April 13, in retaliation for his union activities, thereby violating Section 8(a)(3) and (1) of the Act. I find merit in these contentions. As an initial matter, I find that the General Counsel has made a prima facie showing sufficient to support the inference that the above conduct by Respondent, which the latter does not dispute occurred, was motivated by antiunion considerations. Hill, as found above, was an active and open union adherent, and Respondent's knowledge of his activities in this regard, and its opposition thereto, are well documented in the record. These factors, and the fact that the conduct in question began almost immediately after the onset of union activities and soon after it learned of Hill's involvement there, provides a reasonable basis for inferring that Respondent's actions may have been motivated, at least in part, by a desire to retaliate against Hill for bringing in the Union. The General Counsel having made out a prima facie case, the burden shifts to the Respondent to show that the actions it took towards Hill would have occurred even if Hill had not engaged in any union activity.

Regarding the allegation that Hill's driving assignments were suddenly changed on or about March 22, as stated above Hill credibly testified, and Respondent does not deny, that a change in his assignment to short runs did occur. Belt, in fact, readily admitted that after March 21, Hill was assigned to shorter runs. He claims, however, that Hill was assigned to shorter runs because of his "health condition." (Tr. 25.) Belt did not explain what "health condition" Hill may have been suffering from on March 21, to have warranted the change in his driving assignment. There is no question that Hill had suffered a seizure while on the job. However, that incident occurred in March 1994, almost 1 year prior to the change in assignments in March 1995, and Hill thereafter was released to return to work without restrictions by his own physician and a DOT physician. Hill returned to work and continued working without further incident until forced to go on medical leave on April 13. If Hill had experienced a recurrence of seizures or suffered from other medical problems after March 1994, the record does not show it. Hill did testify that either in December 1994, or January 1995, he mentioned to Belt that he was experiencing headaches

due to a lack of sleep resulting from the fact that he was making long haul runs 5 days in a row, and asked if Belt could assign him maybe one local run per week to break up the pace. The record does not make clear if Belt honored Hill's request. However, given that this particular conversation, which Belt did not refute, occurred more than 3 to 4 months prior to the March 22 change of assignment, I find it highly unlikely that this is what Belt was referring to when he claimed that Hill's "medical condition" prompted the change. As Belt's explanation for changing Hill's assignment lacks evidentiary support, and given his lack of credibility on other matters, I reject Belt's explanation for changing Hill's driving assignments. As no credible explanation was proffered by Respondent for the change in Hill's assignments after March 21, the General Counsel's prima facie case remains intact, and a finding is warranted that the change was intended to punish Hill for his union activity, and violative of Section 8(a)(3) and (1) of the Act.

A similar finding is warranted with respect to the warning issued to Hill on April 4 for failing to turn in his previous day's bills of lading. Hill testified, without contradiction, that turning in bills of lading a few days after a particular run was a common practice among drivers and that no disciplinary action had ever been taken against drivers for doing so. Hill's testimony in this respect was corroborated by Holland who likewise testified, without contradiction, that he had on least five or six different occasions turned in his paperwork 2–3 days late and was never warned or disciplined for it. The Respondent, as noted, did not dispute the above assertions by Hill and Holland, and produced no evidence to show that it had disciplined other drivers in the past for similar conduct. Nor did it offer to explain either at the hearing or in its posthearing brief what, if anything, rendered Hill's failure to turn in his paperwork so egregious as to suddenly cause it to issue Hill a warning for conduct which it had been so willing to tolerate in the past. Given these circumstances, I am convinced that Respondent would not have issued Hill a warning had he not been engaged in union activities, and that its purpose in doing so was to discourage Hill and others from further lending their support to the Union.[49] Accordingly, I find that the warning issued to Hill violated Section 8(a)(3) and (1) of the Act. *Action Auto Stores,* 298 NLRB 875, 898 (1990).

The final issue regarding Hill involves the question of whether he was placed on medical leave in retaliation for his union activities. Hill's prounion stance and activities on behalf of the Union are not disputed, nor is Respondent's knowledge of such activities. The numerous instances of unlawful conduct described supra, engaged in by Respondent's owner and its various managers and supervisors, sufficiently establish Respondent's antiunion animus. The above facts, viewed together with the unlawful change in Hill's driving assignment and the warning issued to him, and the fact that when forced to go on medical leave Hill was fully capable of working and had in fact been doing so without any problem for more than a year, are sufficient to support the inference that Respondent placed Hill on medical leave as further retaliation for his union activities. As the General Counsel has made a prima facie showing that Hill was placed on medical leave for discriminatory reasons, the burden now rests with the Respondent to show that it would have placed Hill on medical leave even if he had not engaged in such activities. The Respondent, in my view, has not met its burden.

The Respondent asserts that it had no alternative but to place Hill on medical leave as it had been directed to do so by DOT physician, Dr. Feldman and by its insurance carrier, both of which purportedly instructed Respondent that Hill should not be allowed to continue driving until such time as he underwent a full physical evaluation and was certified to return to work.[50] In support of its assertion, the Respondent produced the letters it relied on to justify Hill's forced medical leave, which documents have been made part of the record in this matter as Respondent's Exhibit 18 (Dr. Feldman's letter) and Respondent's Exhibit 46 (letter from Marvin Johnson & Associates, Respondent's insurance broker). However, having reviewed Respondent's Exhibits 18 and 46, I have some serious reservations as to what may have motivated Dr. Feldman and Marvin Johnson & Associates to pen their respective letters. Dr. Feldman's letter, for example, appears to be a followup to an earlier conversation Belt had with someone at Dr. Feldman's office named "Kelly," presumably the same individual previously identified by Hill. There is no evidence, however, to show what may have precipitated the Belt-Kelly conversation in the first place, and while it is not clear who may have made the initial contact, the tenor of Dr. Feldman's letter leads me to believe that Belt initiated the contact with Dr. Feldman's office. Any doubts in this regard could easily have been dispelled by Belt at the hearing. Belt, however, was not questioned on this matter and consequently offered no clue as to what caused him to consult with Dr. Feldman. Interestingly enough, while Dr. Feldman's letter makes reference to two drivers with "histories of seizures and chest pains" who should not be driving, the employees in question are not mentioned by name. Thus, it is not clear from the letter if Hill was one of the two drivers referred to by Dr. Feldman. But even assuming for the moment that Hill was one of the two drivers alluded to in the Feldman letter, there remains the question what, if anything, may have caused the Respondent to suddenly seek a medical opinion on Hill's continuing capacity to perform his driving duties. Clearly, Belt could not have been motivated by any medical problems Hill might have been experiencing just prior to his medical leave, for the record reflects that Hill had been performing his driving duties in a satisfactory manner for more than 1 year without further incident. In fact, Belt's own testimony makes it abundantly clear that it was Hill's seizure of more than a year ago, which led Belt to place Hill on medical leave, and not any recent reoc-

[49] The Respondent's answer denied that such a warning was ever issued to Hill, despite the documentary evidence in its own files showing that it did issue such a warning.

[50] The Respondent asserts in its posthearing brief that Hill continued to "suffer innumerable instances which has incapacitated [Hill] from working," citing to testimony by Hill and documentary evidence showing that he made several visits to his neurologist, Dr. Cristea, in January 1995 (R. Exh. 17). Hill, however, testified that his visits to Dr. Cristea were simply followup visits and not due to further instances of seizures he may have experienced, as Respondent erroneously suggests. The documentary evidence received in evidence and relied on by the Respondent shows that the followup visits occurred in late January. During one such visit on January 25, Hill underwent a cerebral angiogram. He was subsequently certified to return to work. Although the certificate returning him to work releases him for work on January 30 "with restrictions," it is unclear whether the restrictions were temporarily imposed because he had just undergone the angiogram or for some other reason. In any event, it appears, and the Respondent does not contend otherwise, that Hill thereafter continued to perform his usual duties without any restrictions.

currence of this or any other medical problem. Thus, when asked what were the "circumstances of Hill's leaving" Respondent's employ, Belt responded by referring to the March 1994 seizure episode. It is therefore patently clear to me that Respondent's decision to place Hill on medical leave was not premised on any medical problems Hill had been experiencing, and while I have no reason to question the statements made in Dr. Feldman's letter, I am firmly convinced that Belt set up the chain of events which led Dr. Feldman to unwittingly issue his letter, thereby providing Belt with an excuse to rid himself, once and for all, of one of the Union's most ardent supporters. For these reasons, I place no credence in Dr. Feldman's letter.

The letter from one Don Doty of Marvin Johnson & Associates to Belt suffers from the same infirmity as the Feldman letter. Like the Feldman letter, the Doty letter makes reference to a prior conversation between Doty and Belt in which they purportedly discussed "drivers with known health problems." The Doty letter refers Respondent to federal regulations requiring the certification of "any driver whose ability to perform his normal duties has been impaired by a physical or mental injury or disease." It further advises, however, that a waiver may be obtained by an employer that would permit employees suffering from some "physical defect" to continue driving if they were "still able to perform their duties." Although the Doty letter, like the Feldman letter, does not identify the two drivers by name, Belt stated that Hill was one of the two drivers referenced therein. The record also does not make clear what if anything may have prompted the discussion between Belt and Doty of "drivers with known health problems," although Belt conjectured that Doty must have learned of Hill's medical condition during an insurance audit of Respondent's "files" conducted on or about April 11. Doty's letter, however, makes no mention of such an audit or provides insight into how he might have learned of Hill's alleged medical condition. Clearly, if Hill's "file" had been reviewed by the insurance broker, as suggested by Belt, it more likely than not would have revealed that since his seizure in March 1994, Hill had been certified by a DOT physician and had worked consistently without restriction or incident for over 1 year since the seizure. Given these circumstances, I find it highly unlikely that Hill's "file" by itself would have triggered the letter from Doty to Belt. While I do not disbelief Respondent's claim that it underwent an insurance review sometime around April 11, given the suspicious circumstances surrounding the Feldman letter, I am inclined to believe that Belt also had a hand in getting Doty to provide him with some documentation that would allow him to justify placing Hill on medical leave. Finally, even if I were to believe that Belt had no involvement in the issuance of the letter and that Hill's prior medical history was of some concern to Doty, the letter sent by Doty to Belt in no way directs, or even recommends, that Respondent remove Hill from his driving duties and place him on medical leave, as the Respondent would have me believe. Rather, the letter simply recommends that the two unnamed drivers be re-examined to "determine the extent of their disability and or ability to be certified under federal law." Indeed, Doty makes reference to the likelihood of a waiver being obtained where the employee suffering from the "physical defect" was able to continue working, as was clearly the case with Hill. If the Respondent had been interested in retaining Hill, Doty's letter provided it with the means for doing so. Instead, anxious to rid itself of one more union adherent, Belt simply ignored the waiver suggestion provided by Doty in his letter, and proceeded to interpret, albeit erroneously, Doty's letter as support for its decision to place Hill on medical leave. Under these circumstances, I find that as with the Feldman letter, the Respondent simply seized on the Doty letter as a way to justify forcing Hill on medical leave, in the apparent belief that this would diminish the number of union supporters among the driver ranks, and thereby undermine employee support for the Union. As the letters were simply a pretext to help Respondent justify placing Hill on medical leave because of his union activities, I find that the Respondent has not rebutted the General Counsel's prima facie case. Accordingly, by placing Hill on medical leave on April 13, the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged

III. THE ELECTION ISSUES IN CASE 13–RC–19111

A. The Challenged Ballots

1. Dooley, Hasse, and Holland

Having found that Dooley, Hasse, and Holland were unlawfully terminated by Respondent because of their union activities, I find that all three retained their employee status at all times prior to the election with the concomitant right to vote. Accordingly, I shall recommend that the challenge to their ballots be overruled. *A-1 Portable Toilet Services*, 321 NLRB 800 (1996).

2. Steve Andrysiak

Andrysiak's ballot, as noted, was challenged by the Union on grounds that he was an office clerical employee, rather than a driver, at the time of the election and ineligible to vote. The Respondent contends that Andrysiak is a "dual function" employee who performs both driving and office clerical duties, and who shares a community of interest with other drivers. Accordingly, it argues that Andrysiak was entitled to vote in the election. The test for determining whether a "dual function" employee, that is one who spends part of his or her working hours performing bargaining unit, should be included in the bargaining unit was set forth by the Board in *Berea Publishing Co.*, 140 NLRB 516 (1963). The Board there held that in making that determination it would apply the same standards as those applied to part-time employees. Thus, in each case, an employee who is "regularly employed for sufficient periods of time [in unit work] to demonstrate . . . a substantial interest in the unit's wages, hours, and conditions of employment" should be included in the unit. See *Manhattan Construction Co*., 298 NLRB 501 (1990). Applying that criteria to Andrysiak, I find, for the reasons set forth below, that he should not be included in the unit of drivers sought to be represented by the Union.

The record reflects that Andrysiak was hired as a driver by Respondent in October 1994, and that he performed driving duties until sometime in mid-February. In February, Andrysiak was told by Belt that he wanted Andrysiak to begin cross-training into clerical and operations duties. Soon thereafter, Belt began training Andrysiak, assisted by Day who trained him on the dispatching work. By March, Andrysiak was performing duties typically performed by the office clerical staff such as preparing trip and fuel reports, and reviewing drivers' logs. Additionally, he assumed responsibility for preparing the paper work required to have containers transported from rail yards to Respondent's facility, and would at times dispatch drivers to retrieve the containers. Andrysiak, who testified on behalf of the Respondent, claims that despite his assignment to

the office clerical staff, he continued to perform normal driving duties from January through June, and indeed was continuing to do so through the date of the hearing in this matter. Andrysiak was not a convincing witness, for aside from what I find was a poor demeanor on the witness stand, he was deliberately evasive in responding to questions posed to him by the General Counsel, and seemed particularly reluctant to confirm statements made by him in a sworn affidavit he had earlier provided to the Board. Accordingly, except where supported by documentary evidence or corroborated by other witnesses, I do not credit Andrysiak. Thus, while the Respondent produced documentary evidence, in the form of a driver's daily log, showing that Andrysiak performed driving duties all of January, half of February, and 5 days in April, no similar evidence was produced for March, or for the period after April, to substantiate Andrysiak's and Respondent's claim that Andrysiak continued to drive on a regular basis from January to June and through the day of the hearing. Indeed, the logs it did produce establish that while Andrysiak remained a regular driver through January, such duties changed dramatically in the second half of February when, by his own admission, Andrysiak performed no driving duties. No explanation was provided as to why Andrysiak was not assigned driving duties during the second half of February, or what other duties he may have been performing during that period. Absent any such explanation, and given Andrysiak's testimony that he was asked by Belt in February to begin training for a clerical position, I find it reasonable to infer that Andrysiak was not assigned driving duties because he was cross-training to become a clerical employee. Likewise, Andrysiak's testimony that he began performing clerical duties in March, and Respondent's failure to produce a driver's log for Andrysiak showing he performed driving assignments during the month of March, convinces me that in March Andrysiak performed clerical work exclusively, and was assigned no runs to make. Thus, except for the five runs he made in April, the record is devoid of any credible evidence showing that after mid-February the Respondent continued to assign Andrysiak to either long- or short-haul delivery runs. The omission of Andrysiak's name from Respondent's Exhibit 2, which identifies all of Respondent's drivers and their earnings for the period from "3–2–95 to 4–6–95" indicates clearly that Andrysiak performed no driving whatsoever during the period in question. While Andrysiak may have subsequently been assigned to do a few runs in mid to late April, these five assignments are insufficient to establish that from the time he became an office clerical employee in late February or early March to the date of the election on April 29, Andrysiak was "regularly employed for sufficient periods of time" as a bargaining unit employee sufficient to establish that he had a substantial and continuing interest in the bargaining unit's wages and working conditions to qualify him as a dual purpose employee. Accordingly, I find, contrary to the Respondent, that Andrysiak is not a dual function employee, but rather is an office clerical employee. As he was not eligible to vote in the election, the Union's challenge to his ballot is sustained.

B. The Objections

The Union contends that the Respondent interfered with the employees free choice in the election by engaging in the following conduct:

1. On or about March 21, Belt and Day threatened that Respondent would shut down its Indiana operations and move to Illinois because of the union activity.

2. Belt interrogated and threatened an employee in his office about his union activities.

3. Amy Faure threatened union committee member Dooley and created the impression that Respondent was engaging in the surveillance of the union activities.

4. Constructively discharged Sadler by withholding work from him because of his union activities.

5. Belt withheld work and assigned less desirable routes, resulting in loss of income, to Holland, Kawa, Hill, Sadler, Dooley, Hasse, and Michaels.

6. Crohan made threatening remarks to Holland because of his support of the Union.

7. Day interrogated Michaels about his union activities on or about March 27, and created the impression she was engaging in the surveillance of employee union activity.

8. Issuing a written reprimand and laying off Sigler on or about March 31.

9. Hasse was discriminatorily given a less desirable run and terminated in late March.

10. Dooley was discriminatorily given a less desirable run and terminated about April 4.

11. Holland was discriminatorily given a less desirable run, given a written warning, and terminated about April 6.

12. Hill was discriminatorily given a less desirable run, a written reprimand, and not allowed to work until he submitted another medical release.

13. Respondent discriminated against employee Bill Keener by withholding work from him and not allowing him to work until he obtained another medical release.

14. Belt interrogated Hill by phone on or about April 24, about his union activities and made camouflaged threats.

15. Faure made statements and distributed literature on or about April 25, threatening employees with loss of wages and benefits if they voted for the Union.

16. Helton implicitly threatened to lay off seven drivers because of their union activities in literature distributed on or about April 30.

17. Respondent added an ineligible voter, Andrysiak, to the voter eligibility list.

18. The Union further alleges that the Respondent engaged in objectionable conduct during the election when Faure, Belt, Day, Helton, and Attorney Liszka formed a welcoming committee at the plant, and positioned themselves in a manner that would allow employees entering to vote to see them, thereby allowing them to campaign near the polling area and to intimidate employees as they entered to vote.

Objections 4, 8, 13, and 18 are found to be without merit and are overruled as no evidence was produced in support thereof. The remaining objections parallel allegations in the complaint, which have been found to be meritorious. The objections are therefore sustained and are further found to be sufficient to warrant setting aside the April 29, 1995 election.

IV. THE PROPRIETY OF A BARGAINING ORDER

The General Counsel seeks a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). While acknowledging that a secret-ballot election is the preferred method for determining if employees wish to be represented by a union, the General Counsel argues that the Respondent's unlawful con-

duct here was so egregious and pervasive that it created a coercive atmosphere rendering impossible the holding of a free and fair second election. It asserts that the only appropriate remedy given the severity of the Respondent's conduct is the imposition of a *Gissel* bargaining order.

In *Gissel* the Court identified two situations in which bargaining orders might be warranted: "exceptional" cases fraught with "outrageous" and "pervasive" unfair labor practices, and certain "less extraordinary" cases attended by misconduct that is "less pervasive" but nevertheless had a tendency to undermine the Union's majority strength and impede the Board's election processes. Regarding the latter type of cases, the Court stated that a bargaining order should issue where "the possibility of erasing the effects of past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. at 614–615.

I agree with the General Counsel that under the circumstances of this case, a bargaining order is the only appropriate remedy for the unfair labor practices committed by the Respondent. In so doing, I need not determine whether the unfair labor practices fall within the first or second category described in *Gissel,* for I find that they are, regardless of category, quite sufficient to justify a bargaining order. The Union's majority status was unequivocally established on March 21, when 10 of Respondent's 18 drivers, which constitute the bargaining unit herein, signed petitions authorizing the Union to represent them for purposes of collective bargaining (G.C. Exh. 5). This fact is not disputed by the Respondent. Having learned or suspected that its drivers were engaged in organizational efforts, the Respondent, on March 21, embarked on a course of unlawful conduct designed to not only learn of the extent of its drivers involvement in such activities, but also to intimidate, undermine, and destroy its drivers' efforts in this regard. The Respondent's efforts included the unlawful interrogation of most of the employees who signed the petitions, several threats of discharge, unspecified reprisals, threats of plant closure, creating the impression that the employees' activities were being kept under surveillance, and issuing written warnings to employees because of their involvement with the Union. Some of this unlawful conduct, more particularly the threats of plant closure and discharge, amount to "hallmark" violations of the Act. The Board has long held that "threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain*." New Life Bakery,* 301 NLRB 421, 431 (1991); *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988). The coercive nature of such conduct was rendered even greater by the fact that some of these threats were made by such high level management officials as Respondent Owner Faure, her husband, Crohan, Vice President Burnson, and Operations Manager Belt. See *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992); also *Weldun International,* 321 NLRB 733 (1996). The involvement by high management officials in such unlawful activity would clearly convey to employees the message that Respondent was deeply committed to its antiunion position, and that this was a commitment from which it would not likely retreat. *Salvation Army Residence*, 293 NLRB 944, 945 (1989). Of greater significance, however, is the fact that Respondent did not confine itself simply to threats of discharge but indeed carried out such threats initially by changing the work assignments of certain individuals it knew or suspected were involved with the Union, issuing 1- or 2-day suspensions, and eventually discharging, constructively or otherwise, 7 of the 12 employees who signed the petitions. Given all of the above circumstances, including the relatively small size of the unit and the swiftness, severity, and extensiveness of Respondent's unlawful campaign, and the involvement by upper management in such activities, I find it highly unlikely that Respondent's employees would be willing or freely able to express their choice in another election and am convinced that merely requiring the Respondent to refrain from any unlawful conduct will not suffice to erase the lingering effects of the Respondent's violations. See, e.g*., Adam Wholesalers, Inc.,* 322 NLRB 313 (1996). Accordingly, I find that the employees' desires for union representation, as reflected by their signatures on the union petitions would, on balance, be better protected by a bargaining order than by traditional remedies. As the Union's majority status was achieved on March 21,[51] and as the evidence indicates that Respondent's conduct began at or about the same time, the Respondent's bargaining obligation is deemed to have begun on March 21, 1995.

Having found that Respondent was obligated to bargain with the Union on March 21, I further find that Respondent violated Section 8(a)(1) and (5) of the Act when, on or about April 8, it unilaterally implemented its L.S.F. driver company policy and procedures manual containing new work rules for employees, and by unilaterally discontinuing its long-established practice of allowing drivers to use their ComData cards for cash advances. See, e.g., *Electro-Voice, Inc.,* 320 NLRB 1094, 1095 (1996); *International Door*, 303 NLRB 582, 602 (1991).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time truck drivers employed by the Employer at its facility currently located at 1334 Field Street, Hammond, Indiana; but excluding all other employees, dispatchers, office clerical employees, guards and supervisors as defined in the Act.

4. At all times since March 21, 1995, and continuing to date, the Union has been the exclusive representative of all the employees within the appropriate unit for purposes of collective bargaining.

5. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act:

(a) Creating the impression that it is keeping its employees' union activities under surveillance.

(b) Coercively interrogating employees regarding their own or other employees' union activities.

[51] The General Counsel suggests in her posthearing brief (p. 83, fn. 44), that the Union attained majority status on March 20. However, a review of G.C. Exh. 5 (the union petitions) clearly reveals that only 6 employees signed the union petitions on March 20, out of a total of 18 (not counting Andrysiak who is found not to have been a unit employee at the relevant time period here) employees.

(c) Threatening employees with plant closure, loss of jobs, discharge, and other unspecified reprisals because they engaged in union activities.

6. The Respondent has violated Section 8(a)(3) and (1) of the Act by:

(a) Issuing written warnings to Ron Holland and Dennis Hill in retaliation for their union activities.

(b) Laying off Mark Hasse for 1 day, and Walter Michaels for 2 days because of their union activities.

(c) Changing the work assignments of Ronald Holland, Walter Michaels, Mark Hasse, and John Kawa because of their support for or activities on behalf of the Union.

(d) Discharging, constructively or otherwise, Mark Hasse, Michael Dooley, Ronald Holland, Dennis Hill, Walter Michaels, William Owens, and John Kawa because of their activities on behalf of or their support for the Union.

7. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally instituting new work rules for employees on April 8, 1995, and by discontinuing its practice of allowing drivers to use their ComData cards for cash advances.

8. The Respondent engaged in objectionable conduct requiring the election conducted on April 29, 1995, in Case 13–RC–19111 be set aside.

9. The unfair labor practices found are sufficiently serious and pervasive as to warrant a remedial order requiring the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the above-described appropriate unit.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent was obligated to recognize and bargain with International Brotherhood of Teamsters, Local 142, AFL–CIO as of March 21, 1995, it shall be ordered to do so. Further, the Respondent shall be required to rescind the work rules that were unilaterally implemented in April 1995, and to reinstate its policy regarding usage of the ComData cards by employees for cash advances until such time as the parties negotiate in good faith to agreement on said issues or a valid impasse is reached.

The Respondent, as noted, discriminated against Mark Hasse by laying him off for 1 day on March 24, and by giving Walter Michaels a 2-day suspension beginning on or about March 27. It also discriminated against both Hasse and Michaels, as well as Ronald Holland and John Kawa, by changing their driving assignments, and further discriminated against Mark Hasse, Michael Dooley, Ronald Holland, Dennis Hill, Walter Michaels, William Owens, and John Kawa by actually or constructively discharging them for engaging in union activities. To remedy its unlawful conduct, the Respondent shall be directed to offer the above discriminatees full and immediate reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges which they previously enjoyed, and make them whole for any monetary or other losses resulting from any suspension, change in driving assignments, or discharge suffered by the above individuals, in accordance with the formula set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest on the amounts to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge, suspension, or layoff of these individuals, and shall further be directed to rescind and remove from its files the discriminatory warnings issued to Ronald Holland and Dennis Hill, and to notify the above individuals in writing that it has done so. Finally, given the extensive and egregious nature of Respondent's conduct, I shall include broad remedial language in the recommended Order.

[Recommended Order omitted from publication.]